In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-512

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

vs.

LAURO DE LOS SANTOS and SEATTLE STEVEDORE CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the
United States Court of Appeals
for the Ninth Circuit

GRAYDON S. STARING
Two Embarcadero Center
San Francisco, California 94111
Attorney for Petitioner

LEGROS, BUCHANAN, PAUL
& MADDEN
ROBERT H. MADDEN

LILLICK McHOSE & CHARLES
EDWARD M. KEECH
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7692

SUBJECT INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statute involved	3
Statement of the case	3
Reasons for granting the writ	6
Background of the question	6
The conflicts	8
Importance of the question	13
Related cases	16
Conclusion	17

TABLE OF AUTHORITIES CITED

Cases

Page

Anderson v. Iceland Steamship Co., 431 F. Supp. 869 (D. Mass. 1977) 5, 12

Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978) 9, 12

Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757, 1976 A.M.C. 2048 (4th Cir. 1976) 9

Bachtel v. Mammoth Bulk Carriers, Ltd. and Twin Harbor Stevedoring Co., 9th Cir. Nos. 77-3043 and 77-3645, decided August 20, 1979 ..... 14, 16

Briley v. Charente Steamship Co., 572 F.2d 498 (5th Cir. 1978) 9

Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331, 1977 A.M.C. 989 (5th Cir. 1977) 9, 11

Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 1978 A.M.C. 1920 (2d Cir. 1978) 8

Chavis v. Finnlines Ltd., 576 F.2d 1072 (4th Cir. 1978) 9

Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979) 5, 8

Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798, 1978 A.M.C. 1277 (2d Cir. 1978) 9, 10

Edmonds v. Compagnie Generale Transatlantique, No. 78-479 (June 27, 1979) 15, 16, 17

Gay v. Ocean Transport & Trading Ltd., 546 F.2d 1233, 1977 A.M.C. 996 (5th Cir. 1977) 9, 11

Griffith v. Wheeling-Pittsburgh Steel Corp., 3d Cir. Nos. 78-2159, 78-2160 and 78-2161, decided August 24, 1979 15

Halycon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 1952 A.M.C. 1 (1952) 15

Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449, 1978 A.M.C. 355 (2d Cir. 1978) 9, 10

Hurst v. Triad Shipping Co., 554 F.2d 1237, 1977 A.M.C. 1625 (3d Cir. 1977) 9, 10, 12

Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 1964 A.M.C. 1075 (1964) 7

Lawson v. United States, 9th Cir. No. 77-2510, decided August 21, 1979 14

Lopez v. A/S, D/S Svendborg, 581 F.2d 319, 1978 A.M.C. 1655 (2d Cir. 1978) 8

Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364, 1978 A.M.C. 826 (2d Cir. 1978) 8, 9

Matthews v. Ernst Russ Steamship Co., 7th Cir. 78-2547, decided August 20, 1979 ..... 14, 16

Table of Authorities Cited

Cases

Page

Munoz v. Flota Merchante Grancolombiana, 553 F.2d 837, 1977 A.M.C. 843 (2d Cir. 1977) 9, 10

Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 1976 A.M.C. 551 (2d Cir. 1976) 9

Prohoroff v. Kawasaki Kisen Kaisha, Ltd., 90 Cal. App. 3d 640, 153 Cal. Rptr. 287 (1979) 8

Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979) 9

Riddle v. Exxon Transportation Co., 563 F.2d 1103, 1978 A.M.C. 741 (4th Cir. 1977) 9

Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861, 1977 A.M.C. 1289 (2d Cir. 1977) 9

Samuels v. Empresa Lines Maritimas Argentinas, 573 F.2d 884, 1978 A.M.C. 1647 (5th Cir. 1978) 9

Wiles v. Delta Steamship Lines, Inc., 574 F.2d 1338, 1978 A.M.C. 2427 (5th Cir. 1978) 9

Wescott v. Impresas Armadoras S.A., 564 F.2d 875 (9th Cir. 1977) 9, 12

Statutes

28 U.S.C. section 1254(1) 2

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) 2, 3, 4, 6, 7, 13, 14, 15

Regulation

Safety and Health Regulations for Longshoring 29 C.F.R. Section 1918.53(a)(5) 11

Miscellaneous

2 F. Harper & F. James, The Law of Torts 1015 (1956) 11, 13

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong., & Ad. News 4698 7

Restatement (Second) of Torts (1965):

Section 343 ..... 5, 6, 8, 10, 12

Section 343A 5, 6, 8, 10, 12

Section 409 10

Section 414 10

S. Rep. 92-1125, 92nd Cong., 2d Sess. 7

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No.

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

VS.

LAURO DE LOS SANTOS and SEATTLE STEVEDORE CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the
United States Court of Appeals
for the Ninth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, first entered in this case May 1, 1979, as to which rehearing was denied June 28, 1979.

OPINIONS BELOW

The order and opinion of Judge Walter T. McGovern, Chief Judge of the United States District Court for the Western District of Washington, are not officially reported[1] but are set forth in Appendix pages A-1 through A-6, *infra*. The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported at 598 F.2d 480 and is set forth in Appendix pages B-1 through B-23, *infra*. The order of the Court of Appeals denying the petition for rehearing is not reported but is set forth in Appendix pages C-1 through C-3, *infra*.

JURISDICTION

On May 1, 1979, the Court of Appeals entered its judgment reversing the decision of the District Court granting the petitioner's summary judgment motion. A petition for rehearing was timely filed May 15, 1979, and was denied on June 28, 1979. The jurisdiction of this court is invoked under 28 U.S.C. section 1254(1).

QUESTION PRESENTED

The question presented is whether a shipowner is required to countermand a stevedore contractor's informed decision regarding the safety of work methods and equipment in order to avoid liability to longshoremen who are employees of the stevedore company under the negligence standard of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b).

---

[1]They are reported at 1976 A.M.C. 2583.

STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. § 905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

Plaintiff is a longshoreman who filed this action within the diversity jurisdiction of the United States District Court for the Western District of Washington to recover damages, in addition to his workers' compensation benefits, for injuries he sustained aboard petitioner's ship just after the effective date of the 1972 Amendments to the

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b).

For two days, plaintiff and other longshoremen, all employees of Seattle Stevedore Company, had worked with a winch whose brake continually malfunctioned (Appendix, p. B-2).[2] Although the longshoremen complained to their supervisors (Appendix, p. B-19), those supervisors never relayed the complaints to the shipowner, and the plaintiff did not contend that the shipowner ever knew of the malfunction (Appendix, p. A-4). When a malfunction of the brake caused a load of cargo to land unevenly and some sacks of cargo to spill off the load, the stevedore company's hatch tender directed the load with the remaining sacks in a loose pile to be raised about 15 feet. With full knowledge of the condition of the brake and after surveying the remaining sacks on the load and deciding there was no danger, the hatch tender decided to allow the load to remain suspended over the longshoremen while they cleaned up the spill. (Appendix, pages B-2, B-3).[3] About ten minutes later, more sacks fell, dislodged because of the slipping brake, and injured plaintiff (Appendix, p. B-3).

The district court granted the shipowner's summary judgment motion, holding that the shipowner could not be held negligent and that the longshoremen's working under the suspended load was so blatantly dangerous that any pre-existing defect in the winch could not be a proximate cause of the injury (Appendix A).

---

[2]The facts set forth here are those the courts below considered to be least favorable to the shipowner.

[3]The hatch tender had testified at his deposition that it was solely his decision whether to suspend the load over the men working below. (Deposition of Alvin H. Botler, p. 48.)

The Court of Appeals reversed in an opinion which expressly rejected the decisions of the Second, Fourth and Fifth Circuits applying standards derived from the analogy to the duties of land-based premises owners in sections 343 and 343A of the Restatement (Second) of Torts (1965) (Appendix, pp. B-12, B-13). Instead, the Court of Appeals for the Ninth Circuit, in reliance on *Anderson v. Iceland Steamship Co.*, 431 F. Supp. 869 (D. Mass. 1977), adopted a new standard of care under which it was said the shipowner might be found liable (Appendix, p. B-11). *Anderson*, a case imposing a duty on the shipowner not to discharge cargo posing a danger to longshoremen, had, however, been reversed by the Court of Appeals for the First Circuit. 585 F.2d 1142 (1978).

The shipowner petitioned for rehearing and rehearing *en banc*, arguing that the standard of care derived from the trial court opinion in *Anderson* received no support from the First Circuit opinion in *Anderson* and placed the Ninth Circuit in conflict not only with the Courts of Appeals of the Second, Fourth and Fifth Circuits, as noted by the Court (Appendix, pp. B-12, B-13), but also with those of the First, Third and Seventh Circuits, and probably the Sixth Circuit, and with prior decisions of its own. Denying a rehearing, the Court of Appeals conceded conflict with the recently decided *Clemons*[4] case in the Seventh Circuit, but claimed that there was no conflict with either the First or Third Circuits,[5] since those Circuits, had re-

---

[4]Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979).

[5]This claim was made despite the court's having cited and expressly rejected a Third Circuit case which had embraced a relinquishment of control standard (Appendix, p. B-21, n.7).

jected application of sections 343 and 343A (Appendix, pp. C-2, C-3). The new Ninth Circuit standard, which requires the shipowner to divine danger in the stevedore's considered decision to operate in the face of known conditions, remained unmodified, although it lacked support in any other court of appeals decisions and was in conflict with the law of the First, Second, Third, Fourth, Fifth and Seventh Circuits.

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted because the Court of Appeals has:

1. Rendered a decision in this case in conflict with decisions on the same matter of five other Courts of Appeals, those of the Second, Third, Fourth, Fifth and Seventh Circuits, by its own acknowledgement, and

2. Decided an important question of federal law which has not been, but should be, settled by this Court.

Background of the Question

The issue here arises under 33 U.S.C. section 905(b), a subsection enacted in 1972 as one of the major reforms of the Longshoremen's and Harbor Workers' Compensation Act at that time. By its provisions Congress eliminated unseaworthiness as a ground of recovery by the longshoreman against the vessel and restricted his recovery to an action for negligence, under new conditions furthering the policy of the Act. The legislative history, supported by court decisions since, shows that the new action for negligence is

to be uniform throughout the country[6] but not based upon maritime doctrines.[7] Rather it is to be based upon traditional standards ashore so as to "place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore".[8] The announced policy of the changes made was to establish a fully adequate system of compensation benefits[9] and thus assure that the employer (who has ordinarily the best opportunity to promote safety)[10] "bears the cost of unsafe conditions . . . [so as] to strengthen the employer's incentive to provide the fullest measure of on-the-job safety"[11] and reduce reliance upon suits against vessels.[12] More particularly it was stated that "a vessel shall not be liable . . . for the manner or method in which stevedores or employees of stevedores . . . perform their work".[13]

When longshoremen's negligence cases began to arise under section 905(b), there was no doubt, of course, that the shipowner would be liable for active negligent behavior toward the longshoreman and few cases involving such con-

---

[6]S. Rep. 92-1125, 92nd Cong., 2d Sess. 12; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong., & Ad. News 4698, 4705.

[7]S. Rep., *supra* note 6, at 10; H.R. Rep., *supra* note 6, at 4703.

[8]*Ibid;* "The Committee intends . . . that the vessel shall not be liable . . . unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances." S. Rep., *supra* note 6, at 11; H.R. Rep., *supra* note 6, at 4704.

[9]S. Rep., *supra* note 6, at 2, 5; H.R. Rep., *supra* note 6, at 4699, 4700.

[10]Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 1964 A.M.C. 1075 (1964).

[11]S. Rep., *supra* note 6, at 2; H.R. Rep., *supra* note 6, at 4699.

[12]*See* S. Rep., *supra* note 6, at 4.

[13]S. Rep., *supra* note 6, at 10; H.R. Rep., *supra* note 6, at 4703.

duct have reached the appellate courts.[14] The cases the appellate courts were faced with were of a different character, involving conditions of equipment or of working areas voluntarily accepted by the stevedores or operating methods used by them, as contrasted with active negligent behavior of the vessels. The courts, in order to effectuate the clear policy of the Amendments, began a quest to find in traditional non-maritime sources a suitable definition of the limited circumstances, if any, in which the shipowner should shoulder burdens of preparation, supervision and oversight for the safety of the longshoreman working aboard under the actual control of his stevedore employer. It is that quest which the Court will see illustrated in the decisions listed below, with which the present case is in conflict.

The Conflicts

Prior to the decision in this case the Courts of Appeals, in their quest for a standard limiting the shipowner's duty to oversee the stevedore's safety functions, found three principal formulas. In a number of decisions they applied (as the District Court did in the instant case) sections 343 and 343A of the Restatement (Second) of Torts, giving effect to the provision of section 343A with respect to known or obvious conditions by expecting that the stevedore's supervisors and safety organization might be relied upon to discover and cope with such conditions.[15] In another

---

[14]For a case of active negligence, *see* Prohoroff v. Kawasaki Kisen Kaisha, Ltd., 90 Cal. App. 3d 640, 153 Cal. Rptr. 287 (1979), where the crew put grease on the deck.

[15]Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746, 1979 A.M.C. 999 (7th Cir. 1979); Lopez v. A/S, D/S, Svendborg, 581 F.2d 319, 1978 A.M.C. 1655 (2d Cir. 1978); Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 1978 A.M.C. 1920 (2d Cir. 1978); Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364, 1978 A.M.C. 826

group of decisions the Courts of Appeals implemented the policy of the Act by declining to impose the duty of supervision upon the vessel where it was shown that the shipowner had relinquished full control of the situation to the stevedore.[16] In still another group of cases, which is quite analogous to the last one, substantially the same effect is reached by explicit resort again to the Restatement (Second) of Torts, this time to sections 409 and 414, dealing with the duties retained by those who employ independent contractors.[17]

Although there is conflict in detail among the three groups of cases just described, the same results will probably be reached in most cases under any of their standards. More important than their differences is what they have in

---

(2d Cir. 1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449, 1978 A.M.C. 355 (2d Cir. 1978); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861, 1977 A.M.C. 1289 (2d Cir. 1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 1976 A.M.C. 551 (2d Cir. 1976); Chavis v. Finnlines Ltd., 576 F.2d 1072 (4th Cir. 1978); Riddle v. Exxon Transportation Co., 563 F.2d 1103, 1978 A.M.C. 741 (4th Cir. 1977); Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757, 1976 A.M.C. 2048 (4th Cir. 1976); Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884, 1978 A.M.C. 1647 (5th Cir. 1978); Wiles v. Delta Steamship Lines, Inc., 574 F.2d 1338, 1978 A.M.C. 2427 (5th Cir. 1978); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331, 1977 A.M.C. 989 (5th Cir. 1977); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233, 1977 A.M.C. 996 (5th Cir. 1977).

[16]Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798, 1978 A.M.C. 1277 (2d Cir. 1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449, 1978 A.M.C. 355 (2d Cir. 1978); Hurst v. Triad Shipping Co., 554 F.2d 1237, 1977 A.M.C. 1625 (3d Cir. 1977); Munoz v. Flota Merchante Grancolombiana, 553 F.2d 837, 1977 A.M.C. 843 (2d Cir. 1977); Briley v. Charente Steamship Co., 572 F.2d 498 (5th Cir. 1978); Wescott v. Impresas Armadoras, S.A., 564 F.2d 875, 1979 A.M.C. 930 (9th Cir. 1977).

[17]Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979); Hurst v. Triad Shipping Co., *supra* note 16; Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978); Ruffino v. Scindia Steam Navigation Co., *supra* note 15.

common: recognition of the need for reasonable limitations upon the circumstances when the shipowner must undertake an active duty of care for the safety of the longshoreman, especially in respect of safety inspections and supervision. The decision of the court below in this case conflicts with the decisions of other Courts of Appeals, not only in formulation of standards and in results but, even more importantly, in its rejection of even the attempt to formulate such a standard for the creation of a shipowner's duty, for which the other courts have sought.

The Court of Appeals below expressly rejected the authority of each of the lines of cases described and cited above. The court was "not unmindful" that the Second, Fourth and Fifth Circuits had defined negligence in terms of sections 343 and 343A, but nevertheless chose not to follow them: "We decline to follow the lead of these Circuits . . . ." 598 F.2d at 486, Appendix, pp. B-12, B-13. Similarly the court recognized the line of cases focusing on the stevedore's control and the line deriving limitation of duty from Restatement sections 409 and 414. "[W]e do not follow those cases which have focused . . . on whether the shipowner relinquished control of the stevedoring . . . ." 598 F.2d at 490, Appendix, p. B-21. Those cases, as the court noted in a footnote which included specific mention of sections 409 and 414, were *Cox, Hickman, Hurst,* and *Munoz.* 598 F.2d at 490 n. 7, Appendix, p. B-21.

But the court below went much further than to reject the specific bases on which the shipowner's duty had previously been limited; it rejected the very idea of restriction. The court quoted from a district court opinion:

> Discussions relating to invitees, contractors, primary and second responsibilities, obviousness of dangers, and the relinquishment of control all have the tendency to steer courts away from a balance of the risk of harm against the utility of the particular conduct in question. [598 F.2d at 488, Appendix, p. B-16, *quoting Gallardo v. Westfal-Larsen & Co.*, 435 F.Supp. 484, 496, 1977 A.M.C. 1325, 1342 (N.D. Cal. 1977).]

Thus, this case presents not only specific conflicts of standards and results with prior cases, but also an even more fundamental conflict. American tort law generally imposes firm limits on the duty to take affirmative action, but does not impose such limits on the duty to act reasonably when one does act. As illustrated by the quotation from *Gallardo* regarding the "utility of . . . conduct", the opinion below obliterates the distinction between the duty to act at all and the duty to make one's actions reasonable. *Cf.* 2 F. Harper & F. James, *The Law of Torts* 1015, 1017, 1044-58 (1956).

This is not merely a quibble over the formulation of similar standards. The conscientious application of any of the rejected standards would have led to a different conclusion. The condition of the winch was obvious and known to the stevedore company. Since the condition of the winch was one which the shipowner would expect the stevedore to report to it[18] and since it "was not the type of danger

---

[18]The applicable longshore regulation requires:

> Any defect or malfunction of winches shall be reported immediately to the officer in charge of the vessel. [Safety and Health Regulations for Longshoring, 29 C.F.R. § 1918.53(a)(5).]

that must be faced notwithstanding knowledge",[19] a court applying standards drawn from sections 343 and 343A would have reached a different result.

If the court had followed the line of cases focusing on relinquishment of control, for example its own *Wescott* opinion which relies heavily on the Third Circuit's *Hurst* case, it would have reached a different conclusion. In the *Wescott* case, the court had been persuaded that because there was "an obvious dangerous condition", and the stevedore made no attempt "to change its method of operation" and the stevedore "of its own volition, chose to go ahead despite the condition", there was "no basis for imposing any liability upon the shipowner herein". 564 F.2d at 883, 1979 A.M.C. at 941. Such an analysis would result in a decision in favor of the shipowner in this case.

If the court had not rejected the cases relying on sections 409 and 414 of the Restatement, it would have followed *Anderson*.[20] In that case the Court of Appeals for the First Circuit determined that the shipowner did not owe a duty to protect plaintiff from the danger of the cargo, because that danger was "open, obvious and capable of being protected against by relatively simple measures known, available and practiced in the stevedoring trade". 585 F.2d at 1151. A court applying this standard would have found that the dangers which caused Santos' injury were likewise known and capable of being protected against.

---

[19]Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233, 1242, 1977 A.M.C. 996, 1008 (5th Cir. 1977); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331, 334, 1977 A.M.C. 989, 994 (5th Cir. 1977).

[20]Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978).

And finally, if the court below had not rejected the very idea of imposing limits on the duty to act affirmatively for the protection of others, the result would have been very different indeed. Instead of announcing its standard of care as a startling discovery which disposed of the case, the court would have recognized its formulation of the reasonable man standard as a mere platitude. Whenever one has a duty, one must discharge the duty by the exercise of reasonable care under the circumstances. *See Harper & James, supra.* The court would have further recognized that the 1972 Amendments and the relationship between stevedore and shipowner pose issues which are not adequately resolved by a negligence standard which imposes a responsibility to act to protect the employees of the expert stevedore contractor from the effects of the latter's considered decisions.

Thus, if the court below had recognized the importance of applying concepts of duty under the 1972 Amendments, its decision would have been similar to one or more of the lines of decisions it rejected, since those lines of cases have sought and found workable rules for realization of the Congressional policy and the 1972 Amendments.

Importance of the Question

The question is important first because of its nature. It is clear from the history that Congress intended a major reform by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. The history also indicates a number of policy considerations to be given effect in the Act, such as increased reliance upon the predictability, regularity and adequacy of compensation benefits, the promotion of safety and the reduction of economic loss

through legal proceedings. To describe the longshoreman's new and more limited rights against the vessel, new subsection 905(b) provided but a single word of substance, "negligence", a term which has always been highly variable in content according to the circumstances. Thoughtful exploration and interpretation of its substance are needed if the section is to be given shape to implement the important policies of the Act.

The question presented is important also because of the frequency with which it arises. The history of longshoremen's injury cases in this Court and the number of them to be readily found in the law reports will remind the Court that longshoremen's suits against the shipowner are potentially, and actually, numerous. The numerous appellate court decisions cited in footnotes to the text above, concerning the question presented in this case, should go far to establish its importance.

Whether or not the summary judgment itself be reinstated in this case, the question of the legal standard to be applied is important for consideration by the Court at this time because of the effect that the lower court's decision is already having upon other cases, not only in its own court but in others. The doctrine of the opinion below has been explicitly applied by other panels of the same court in *Bachtel v. Mammoth Bulk Carriers, Ltd. and Twin Harbor Stevedoring Co.*, 9th Cir. Nos. 77-3043 and 77-3645, decided August 20, 1979, and *Lawson v. United States*, 9th Cir. No. 77-2510, decided August 21, 1979, to produce results which could not have been reached under prior decisions of the same or other courts of appeals. The decision below has been cited and evidently followed also

in *Matthews v. Ernst Russ Steamship Co.*, 7th Cir. 78-2547, decided August 20, 1979, and most recently it has again been cited and relied on in *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 3d Cir. Nos. 78-2159, 78-2160 and 78-2161, decided August 24, 1979.

The importance of properly defining the scope of the shipowner's duty to longshoremen is magnified by the decision of this Court in *Edmonds v. Compagnie Generale Transatlantique*, No. 78-479 (June 27, 1979), in which a petition for rehearing is before the Court and a motion to consider that petition together with this petition for certiorari has been filed. *Edmonds* presents the question whether a shipowner, responsible for only 20% of the fault, is liable to the longshoremen for 90% of the damages where the longshoreman was 10% at fault and the stevedore company 70%. The effect of the adoption of the virtually unlimited scope of a shipowner's duty in *Santos* must be evaluated in the light of whether the defendant found liable under such a standard will be able to shift the burden, or any of it, to the party actually responsible.

This Court long ago foreclosed contribution between the shipowner and the stevedore employer. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 1952 A.M.C. 1 (1952). The 1972 Amendments themselves forbid indemnity from the stevedore employer. "[T]he employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void."[21] If this Court is to continue to hold, as it did in its initial decision in *Edmonds*, that the ship-

[21] 33 U.S.C. § 905(b).

owner is liable for all the plaintiff's damages when it is negligent at all, then a decision vastly increasing the scope of the shipowner's duty has a dramatic effect on shipowners, stevedore companies, and the Congressional aims for the 1972 Amendments. If the shipowner is to be held liable virtually vicariously for a failure to supervise the independent stevedore contractor and to be held so liable without the possibility of relief by way of contribution, indemnity or reduction of damages for the concurrent fault of others, drastic burdens have been imposed on the shipowner. Such a situation calls for careful scrutiny by this Court to determine whether the goals of the 1972 Amendments have been implemented or frustrated.

RELATED CASES

The question raised by this case is the same question expected to be raised in *Bachtel v. Mammoth Bulk Carriers, Ltd. and Twin Harbor Stevedoring Co.*, and in *Matthews v. Ernst Russ Steamship Co.*, in both of which cases it is expected that petitions for certiorari will shortly be filed. The question is also intimately related, as shown above, to the question arising under the same statute in *Edmonds v. Compagnie Generale Transatlantique*, No. 78-479, in which case attention has been called to the question by Motion to Defer Ruling on Petition for Rehearing.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant a Writ of Certiorari to review the decision of the Court of Appeals and should consolidate the case for hearing with other cases in which petitions for writs of certiorari are filed raising the same questions and should hear all such cases in conjunction with the rehearing of *Edmonds v. Compagnie Generale Transatlantique,* No. 78-479.

Respectfully submitted,

GRAYDON S. STARING
Attorney for Petitioner

LEGROS, BUCHANAN, PAUL
& MADDEN
ROBERT H. MADDEN

LILLICK MCHOSE & CHARLES
EDWARD M. KEECH
Of Counsel

(Appendices Follow)

Appendices

APPENDICES

		Page
A.	Opinion of District Court Granting Defendant's Motion for Summary Judgment	A-1
B.	Opinion of the Court of Appeals	B-1
C.	Opinion of the Court of Appeals Denying Rehearing	C-1

Appendix A

Lauro de los Santos,

Plaintiff,

vs.

Scindia Steam Navigation Co., Ltd., of Bombay, India,

Defendant.

United States District Court
Western District of Washington

September 1, 1976

No. C74-720S,

WALTER T. MCGOVERN, D.J.:

This matter comes on for consideration upon the defendant Scindia Steam Navigation Co., Ltd.'s Motion for Summary Judgment of dismissal pursuant to Rule 56, Federal Rules of Civil Procedure.

The Court having carefully considered the records and files herein, including but not limited to the agreed pretrial order, the depositions taken of plaintiff Lauro De Los Santos, Lester Hawran, and Alvin H. Botler; plaintiff's Memorandum of Authorities and Supplemental Memorandum in opposition to the Motion; and defendant's Memorandum and Reply Brief in support of the Motion, concludes that the defendant's Motion should be granted.

The Law.

In 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code, sec. 901 *et seq.*) became effective which eliminated causes of action of long-

shoremen against vessels based upon "unseaworthiness" standards and instead restricted the longshoremen to actions based upon negligence theories. The pertinent language of the Amendment, Section 905(b), states as follows:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person * * * may bring an action against such vessel as a third party * * *. The liability of the vessel under this subsection shall not be based upon the warranty of unseaworthiness or a breach thereof at the time the injury occurred." [33 U.S. Code sec. 905(b).]

The divorcement between "unseaworthiness" and "negligence" is complete under the law. *Usner* v. *Luckenbach Overseas Co.*, 400 U.S. 494, 1971 AMC 277 (1971). That Congress intended to substitute negligence principles in place of theories of maritime liability utilized in earlier cases (such as "unseaworthiness" or "nondelegable duty") is well established by the legislative history of Amendment, Section 905(b). 1972 U.S. Congressional and Administrative News, 4703-4705. While there is some debate over the appropriate standard of care a vessel owes a longshoreman under the negligence action created by sec. 905(b), the Court is persuaded that Congress intended to have land-based standards of negligence be applied; these standards are found best expressed in the Restatement (Second) of Torts sec. 343 and sec. 343A (1965). See, *Crowshaw* v. *Koninklijke Nedlloyd B.V. Rijswijk*, 1975 AMC 2630, 398 F. Supp. 1224 (D. Ore., 1975); *Frasca* v. *Prudential Grace Lines*, 1975 AMC 1130, 394 F. Supp. 1092, 1097 (D.C. Md., 1975); *Anuszewski* v. *Dynamic Mariners Corp.*, 1975 AMC 899, 391 F. Supp. 1143 (D.C. Md., 1975); *Citizen* v. *M/V Triton*, 1976 AMC 509, 384 F. Supp. 198, 201, 202 (E.D.

Tex., 1974); 1A BENEDICT on *Admiralty* sec. 112, at 6-10 (7th Ed., 1973).

It is clear under Federal land-based negligence standards that a shipowner is not liable for dangerous conditions created by the stevedore's negligence while the stevedore was in exclusive control over the manner and area of the work (*Frasca, supra; Crowshaw, supra; Slaughter* v. *S.S. Ronde*, 1974 AMC 290, 390 F. Supp. 637 (S.D. Ga., 1974)), nor is the shipowner under a duty to warn the stevedore or his employees of dangers or open and obvious defects which are known to the stevedore or his employees or which are so obvious and apparent that they may reasonably be expected to discover them. *Ramirez* v. *Toko Kaiun K.K.*, 1975 AMC 85, 385 F. Supp. 644, 651 (N.D. Cal., 1974); Restatement (Second) of Torts sec. 343A (1965); PROSSER, *Law of Torts*, p. 403 (2 ed., 1964).

The Facts.

The facts of this case are generally not in dispute and are well set out in the pretrial order and depositions taken of plaintiff (a longshoreman working in the hatch at the time of the accident), Mr. Hawran (the winch driver), and Mr. Botler (the hatch tender). Plaintiff alleges that a winch, which was lowering pallets loaded with sacks of bulgar wheat into the No. 3 hatch, was defective and that this defective winch proximately caused the plaintiff's injuries. Defendant denies that the winch was defective and asserts that, even if the winch was defective, the defective condition was open and obvious to the plaintiff and was in fact known by the plaintiff to be a dangerous condition; that the defective condition was not known to the defend-

ant, nor could the defendant reasonably be expected to have known of the condition; and that the alleged defective condition had only a remote cause-in-fact relationship to plaintiff's accident and was not the proximate cause thereof.

Viewing the facts in a light most favorable to the plaintiff, the Court finds there is no genuine issue of material fact remaining in dispute. Following an initial spillage of sacks caused by the pallet striking the pallet jack (Pretrial Order, Agreed Fact No. 4), the pallet was raised 15 feet overhead by the winch operator and was left to swing overhead of plaintiff as plaintiff worked to clean up the spilled sacks from the hatch floor below. (Agreed Fact No. 5; Deposition of Hawran, pp. 58-59.) There is no dispute that the premises were in exclusive control of the stevedores during the loading operation. Plaintiff does not controvert defendant's claim that no one from the ship's crew was ever informed of the winch's condition prior to the accident. Yet, plaintiff rests his argument on the supposition that the defendant should have known of the condition of the winch and should have taken appropriate action to remedy the situation, and that defendant's failure to so act proximately caused plaintiff's injuries. This argument ignores the applicable principles of negligence law cited above and contained within the Restatement (Second) of Torts sec. 343 and sec. 343A: Even if the ship's gear had been defective (a condition which the Court finds the shipowner did not know nor should it reasonably have been expected to know, given the exclusive control of the gear by the stevedores during the relevant time period), the defendant cannot be held liable under the facts of this case

as a matter of law. There is no dispute that the "jumpiness" of the winch and the positioning of the unevenly loaded pallet after the initial spillage was open and obvious to the plaintiff. (Plaintiff's deposition, p. 56, line 8 through p. 57, line 11.) Indeed, in his deposition plaintiff conceded that the condition of the winch and the positioning of the pallet swinging overhead seemed "dangerous" to him:

> "Q. Was there some reason you started to clean up the sacks before they moved the load overhead? Wasn't it dangerous to go underneath the swinging load?
>
> A. Well, it is, yes.
>
> Q. Did you think it was dangerous to clean up those sacks with the pallet overhead?
>
> A. Well, I am telling you that was dangerous, yes, but it was the practice, we are asked to do the job, you know, cleaning up things for our own good."

Plaintiff's Deposition, p. 58, lines 1-5.

In a case remarkably on point, *Cummings* v. *"Sidarma" Soc.*, 409 F. Supp. 869, 872 (E.D. La., 1976), the Court there held that a vessel owner did not breach its duty of care under the Longshoremen's Act as amended where the alleged defective condition (bales ship's of rubber stowed freely in void spaces between boxed cargo and the ship's skin) was obvious to the longshoremen, and where the position of the bales was expressed during the routine discharging operation.

Here, the Court similarly finds that the manner in which the accident occurred, the fact that plaintiff's activities were so dangerous and the fact that plaintiff undertook his actions free from any direction by the defendant while

recognizing that the circumstances were so dangerous, is such that the defendant cannot be held liable as a matter of law. In addition to the findings above, the Court finds that the alleged defective condition of the winch had only a remote cause-in-fact relationship to plaintiff's accident and could not have been the proximate cause thereof as a matter of law. Either finding is a sufficient basis upon which to grant the defendant's Motion.

Accordingly, defendant Scindia Steam Navigation Co., Ltd.'s Motion for Summary Judgment of dismissal is Granted.

Appendix B

United States Court of Appeals,
Ninth Circuit

Lauro de los Santos, Appellant, vs. Scindia Steam Navigation Co., Ltd., Appellee, Seattle Stevedore Co., Intervenor.	No. 76-3225

May 1, 1979

Rehearing Denied June 28, 1979.

Appeal from the United States District Court
for the Western District of Washington

Before DUNIWAY and CHOY, Circuit Judges, and
GRANT,* District Judge.

DUNIWAY, Circuit Judge:

Several 50 pound sacks of grain tumbled off a pallet, severely injuring appellant longshoreman Lauro De Los Santos, who was working in a ship's hold. Santos sued appellee shipowner Scindia Steam Navigation Co. ("Scindia"), alleging that the accident had occurred because the shipowner had negligently failed to repair the winch by means of which the pallet was lowered into the hold. The district court granted the shipowner's motion

*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

for summary judgment. Its opinion is reported at 1976 A.M.C. 2583. We reverse.

I. *The Facts*

Stated in the light most favorable to Santos, against whom summary judgment was granted, the facts are these:

On the evening of December 10, 1972, Santos and other longshoremen employed by the Seattle Stevedoring Company were loading a cargo of wheat into a hold in Scindia's vessel, the M/S JALARATNA. The longshoremen used a winch that was part of the ship's gear to lower wooden pallets, each carrying seventy fifty-pound sacks of wheat, into the hold.

The ship's winch was unusual in that its controls were located on a platform more than 25 feet above the main deck. From that point, the winch driver could not actually see a pallet of sacks as he lowered it into the hold. He thus had to rely upon the hatch tender to signal to him when to start and stop the winch. Santos and three other men were in the hold. When a pallet reached the bottom of the hold, Santos and his co-workers would stow the sacks. Seattle Stevedoring controlled the loading procedure.

The winch's braking mechanism had continually malfunctioned during the two days prior to the accident and on the day of the accident in that, when the winch driver tried to stop a load, the load continued to fall for several feet before coming to a stop. The winch continued malfunctioning on the night of the accident. As the winch driver lowered the loaded pallet into the hold, the hatch tender signaled him to stop its descent. The winch driver

applied the brake, but the pallet kept falling. When it struck a pallet jack, on which it should have come to rest, about half the sacks spilled off the pallet.

The hatch tender then had the winch driver raise the pallet, carrying the remaining sacks in a loose pile and not fastened down, about fifteen feet up so that Santos and the other men could clean up the spilled sacks. After the winch driver had raised the pallet, the hatch tender looked over the remaining sacks. He thought that they looked stable enough that he concluded that no more sacks would spill off and endanger the men cleaning-up below. Nevertheless, about ten minutes later several more sacks fell off the pallet and landed on Santos.

The parties disagree about what caused those sacks to work loose and fall. The district court accepted the shipowner's position that the pallet had swung back and forth, and that this swinging loosened the sacks. Santos points to deposition testimony which indicates little if any swinging. He relies upon testimony tracing the accident to further malfunctioning of the winch's braking mechanism. The winch driver explained that even though he had the controls set to hold the pallet stationary, the pallet began slipping down into the hold three or four times during the ten minutes, requiring him to pull it back up again each time so that it would not interfere with the cleanup. Santos argues that the defective condition of the ship's winch caused the repeated slipping, and that this slipping and pulling back up caused the additional sacks to work loose and fall.

II. *The Applicable Law*

The Longshoremen's and Harbor Workers' Compensation Act defines the rights of longshoremen injured while taking part in stevedoring operations. Just before Santos' accident, Congress had passed the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub.L. 92-576, 86 Stat. 1251, amending 33 U.S.C. §§ 901-950. The Amendments made sweeping changes in the legal relationships among injured longshoremen, stevedores, and shipowners. Before the Amendments, an injured longshoreman could sue a shipowner for negligence, and also for breach of a warranty of seaworthiness, a form of liability without fault. *Seas Shipping Co., Inc. v. Sieracki,* 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099. If the longshoreman could establish that he had been injured by unsafe conditions aboard the ship, he recovered even if the shipowner had not been negligent. Under *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.,* 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, the vessel owner could in turn seek indemnity against the stevedore company when a substandard performance by the stevedore or its longshoremen had brought the unseaworthy conditions into play. The injured longshoreman could not sue the stevedore, but he was entitled to workers' compensation type benefits without regard to fault.

Under the 1972 Amendments, the injured longshoreman lost his action against the shipowner for unseaworthiness, but in return Congress granted the longshoreman significantly higher compensation benefits. Congress also ended the shipowner's right to indemnity from the stevedore. The shipowner had less need for indemnification because

the abolition of the unseaworthiness action left it liable only when an injured longshoreman could prove it negligent. House Report No. 92-1441, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. and Admin.News, pp. 4698-4705; Senate Report No. 92-1125, 92d Cong., 2d Sess., pp. 8-12; *Davison v. Pacific Inland Nav. Co., Inc.*, 9 Cir., 1978, 569 F.2d 507, 511-13. *Note*, "The Injured Longshoreman v. The Shipowner After 1972: Business Invitees, Land-Based Standards, and Assumption of Risk," 28 *Hastings L.J.* 771, 773-79 (1977). [hereafter, "The Injured Longshoreman"] *Cooper Stevedoring Co. v. Kopke, Inc.*, 1974, 417 U.S. 106, 113, fn. 6, 94 S.Ct. 2174, 40 L.Ed.2d 694.

The Act as amended explicitly preserves the injured longshoreman's right to sue the shipowner for negligence. 33 U.S.C. § 905(b) provides that:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. . . .

In the case at bar, Santos alleged that Scindia had been negligent within the meaning of § 905(b), and that Scindia's negligence had proximately caused his injuries. He timely asserted his right to have the facts tried to a jury.

[1] When a party moves for summary judgment under Fed.R.Civ.P. 56, all of the facts and all reasonable inferences to be drawn from those facts must be viewed in the light most favorable to the party against whom the motion is made. The trial court may grant the motion for sum-

mary judgment only when no material questions of fact remain. *Poller v. Columbia Broadcasting Systems, Inc.*, 1962, 368 U.S. 464, 467, 82 S.Ct. 486, 7 L.Ed.2d 458; *United States v. Diebold, Inc.*, 1962, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176; *United States v. Perry*, 9 Cir., 1970, 431 F.2d 1020, 1022; *Radobenko v. Automated Equipment Corporation*, 9 Cir., 1975, 520 F.2d 540, 543; *United States v. Bissett-Berman Corporation*, 9 Cir., 1973, 481 F.2d 764, 767. Furthermore, we have emphasized that " '[i]ssues of negligence are ordinarily not susceptible of summary adjudication.' " *Arney v. United States*, 9 Cir., 1973, 479 F.2d 653, 660. *See also Leaf v. United States*, 9 Cir., 1978, 588 F.2d 733, 736.

Here, Santos contends that the district court granted the motion for summary judgment only after resolving a number of disputed material facts against him. Santos also argues that the district court applied an incorrect legal standard when it explicitly adopted the standard of negligence set forth in Restatement (Second) of Torts, §§ 343 and 343A. To pass upon these contentions, we must begin by determining what showing of negligence § 905(b) requires when an allegedly dangerous condition of the ship or its gear injures a longshoreman.[1]

The Act does not define "negligence." *Davis v. Inca Compania Naviera, S.A.*, W.D. Wash., 1977, 440 F.Supp.

---

[1]In *Wescott v. Impresas Armadoras, S.A. Panama*, 9 Cir., 1977, 564 F.2d 875, 883, we quoted *Hurst v. Triad Shipping Co.*, 3 Cir., 1977, 554 F.2d 1237, 1251, 1252, for the proposition that a vessel owner owes no duty to protect longshoremen against defects in the equipment the longshoremen and stevedore bring aboard. In this case, it is undisputed that the winch was part of the ship and thus provided for use by the vessel owner.

448, 451; *Gallardo v. Westfal-Larsen & Co. A/S*, N.D. Cal., 1977, 435 F.Supp. 484, 492. In *Davison v. Pacific Inland Navigation Co., Inc.*, 9 Cir., 1978, 569 F.2d 507, 508-09, fn. 1, we specifically reserved the question of what standard of negligence is to be used in a case brought under the Act. We noted there that courts which have already considered the question have applied different standards. Santos' appeal requires us to arrive at a standard.

While the legislative history is not entirely clear, we read the House and Senate Committee Reports, cited *supra*, as calling upon the federal courts to fashion a negligence standard responsive to five specific concerns. *Cf. Gallardo v. Westfal-Larsen & Co. A/S, supra*, 435 F.Supp. at 491, 493.

First, Congress was concerned about safety. The Senate Committee on Labor and Public Welfare protested that longshoring had an injury frequency rate "well over four times the average for manufacturing operations," and called for safer working conditions when it insisted that "every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies. . . ." Senate Report at 2. The Amendments sought to strengthen economic incentives "to provide the fullest measure of on-the-job safety." House Report at 4699. The higher compensation benefits were meant to "assure that the employer bears the cost of unsafe conditions." Senate Report at 2. "Permitting actions against the vessel based on negligence" was meant to "meet the objective of encouraging safety." House Report at 4704. *Samuels v. Empresa Lineas Mariti-*

mas Argentinas, 5 Cir., 1978, 573 F.2d 884, 888 ("promotion of shipboard safety . . . a primary focus" of the negligence action); *Marant v. Farrel Lines, Inc.,* 3 Cir. 1977, 550 F.2d 142, 149, fn. 3 (concurring opinion); *Davis v. Inca Compania Naviera, S.A.,* W.D. Wash., 1977, 440 F.Supp. 448, 454, fn. 14. "Congress was concerned that the vessel owner not become lax in doing what it should reasonably be required to do to prevent injuries to the longshoremen." *Lucas v. "Brinknes" Schiffahrts Ges.* E.D.Pa., 1974, 379 F.Supp. 759, 769 (three-judge court).

Second, to assure uniformity Congress specified that it "intend[ed] that legal questions . . . be determined as a matter of Federal law." House Report at 4705. In *Wescott v. Impresas Armadoras, S.A. Panama,* 9 Cir., 1977, 564 F.2d 875, 882, we held that federal law continues to govern lawsuits between an injured longshoreman and a shipowner. *See also, Brown v. Ivarans Rederi A/S,* 3 Cir., 1976, 545 F.2d 854, 861-63; *Gox v. Flota Mercante Grancolombiana S.A.,* 2 Cir., 1978, 577 F.2d 798, 800-801, fn. 1; *Birrer v. Flota Mercante Grancolombiana,* D.Ore., 1974, 386 F.Supp. 1105.

Third, Congress wanted to make certain that it had really done away with longshoremen's actions based upon unseaworthiness. Concerned that some courts might continue holding vessels strictly liable for unsafe conditions by simply relabeling unseaworthiness "negligence," Congress emphasized that it intended the courts to define "negligence" in accordance with the land-based traditions of not imposing liability without regard to actual fault. *Gallardo, supra,* 435 F.Supp. at 492; *Giacona v. Capricorn Shipping*

Co., S.D.Tex., 1975, 394 F.Supp. 1189, 1192-194; The Injured Longshoreman, *supra*, at 778-79; *Lucas v. "Brinknes" Schiffahrts Ges, supra*, 379 F.Supp. at 767-68, 771-72. The Committee thus reported that they had "rejected the thesis that a vessel should be liable without regard to its fault." Senate Report at 8. House Report at 4702. Rather, Congress concluded that,

> it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.
>
> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like. House Report at 4703. Senate Report at 10.

[2] Under the former law, some unsafe conditions which supported an unseaworthiness action might also have supported a negligence action. Because of the overlap between the two doctrines, Congress feared that its abolition of the unseaworthiness action might lead some post-Amendment courts to conclude that if a set of facts would have amounted to unseaworthiness, Congress meant to preclude a recovery based upon negligence. After collecting a num-

ber of cases to illustrate situations in which the unseaworthiness doctrine would no longer apply, the Committees carefully cautioned that their listing of disapproved cases was "not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence." Senate Report at 10. House Report at 4703-4704. Thus, consistent with Congress' intention to apply the land-based traditions of no liability without regard to fault, it is perfectly possible under the new law for an unseaworthy condition to give rise to a negligence recovery when a vessel fails "to take appropriate corrective action where it knows or should have known about a dangerous condition." House Report at 4704, Senate Report at 10; *Solsvik v. Maremar Compania Naviera, S.A.*, W.D.Wash., 1975, 399 F.Supp. 712, 715; *Slaughter v. Ronde*, S.D.Ga., 1974, 390 F.Supp. 637, 641, *aff'd per curiam*, 5 Cir., 1975, 509 F.2d 973.

[3] Fourth, Congress "intend[ed] that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury." House Report at 4705. Senate Report at 12. Thus, a longshoreman's carelessness reduces but does not necessarily bar his recovery. *Shellman v. United States Lines, Inc.*, 9 Cir., 1975, 528 F.2d 675, 676-77, fn. 1; *Anderson v. Iceland S.S. Co.*, D.Mass., 1977, 431 F.Supp. 869, 872.

Finally, Congress "intend[ed] that the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable." House Report at 4705, Senate Report at 12. *Davis, supra*, 440 F.Supp. at 454.

III. *The Applicable Standard.*

[4] We adopt the following standard of negligence for purposes of 33 U.S.C. § 905(b) actions:

> A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner
>
> (a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such longshoremen, and
>
> (b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger.

See House Report at 4704; Senate Report at 10-11.[2] *Cf. Anderson v. Iceland S.S. Co.*, D.Mass., 1977, 431 F.Supp. 869, 873. We believe that the standard we adopt responds to all five of Congress' concerns. It will promote safety within a comparative negligence framework while avoiding both liability without fault and the defenses of contributory negligence and assumption of risk. *See Gallardo, supra,* 435 F.Supp. at 498.

---

[2]The cited Committee Reports illustrated how the negligence standard described by Congress would apply in an actual case:

> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. House Report at 4704; Senate Report at 10-11.

The structure of Congress' illustration supports the standard of negligence we adopt today.

In adopting the "reasonable care under the circumstances" standard, we are not unmindful of the fact that the Second, Fourth, and Fifth Circuits have defined "negligence" under § 905(b) in terms of a landowner's duty to invitees under Restatement (Second) of Torts, § 343 and § 343A.[3] *See Davison v. Pacific Island Navigation Co., Inc.*, 9 Cir., 1978, 569 F.2d 507, 508, n.1.[4] We decline to follow the

---

[3]These sections of the Restatement provide, in relevant part:

TITLE E. SPECIAL LIABILITY OF POSSESSORS OF LAND TO INVITEES

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§ 343A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

[4]Cases adopting Restatement §§ 343 and 343A include *Canizzo v. Farrell Lines, Inc.*, 2 Cir., 1978, 579 F.2d 682, 684-85; *Samuels v. Empresa-Lineas Maritimas Argentinas*, 5 Cir., 1978, 573 F.2d 884, 885-86; *Wiles v. Delta Steamship Lines, Inc.*, 5 Cir., 1978, 574 F.2d 1339, 1340; *Lubrano v. Royal Netherlands Steamship Co.*, 2 Cir., 1978, 572 F.2d 364, 366; *Anuszewski v. Dynamic Mariners Corp., Panama*, 4 Cir., 1978, 540 F.2d 757, 758-59 (*per curiam*), aff'g D.Md., 1975, 391 F.Supp. 1143; *Brown v. Mitsubishi Shintaku Ginko*, 5 Cir., 1977, 550 F.2d 331, 333-34; *Gay v. Ocean Transport & Trading, Ltd.*, 5 Cir., 1977, 546, F.2d 1233, 1238; *Napoli v. [Transpacific Carriers, Etc.] Hellenic Lines*, 2 Cir., 1976, 536 F.2d 505, 508-509; *Bovia v. S/S Agia Erini, E.D.La.*, 1977, 433 F.Supp. 1020, 1022; *Croshaw v. Koninklijke Nedlloyd B.V. Rijswijk*, D.Ore., 1975, 398 F.Supp. 1224, 1229; *Frasca v. Prudential-Grace Lines, Inc.*, D.Md., 1975, 394 F.Supp. 1092, 1097-98, 1100-01; *Birrer v. Flota*

lead of those Circuits for three reasons.

First of all, § 343(b) and § 343A place limitations on a landowner's liability to an invitee inconsistent with Congress' explicit direction to reject common law rules of contributory negligence and assumption of risk in favor of applying the admiralty concept of comparative negligence.[5]

Mercante Grancolombiana, D.Ore., 1974, 386 F.Supp. 1105, 1112. *Cf. Cox v. Flota Mercante Grancolombiana*, 2 Cir., 1978, 577 F.2d 798; *Ruffino v. Scindia Steam Navigation Co., Ltd.*, 2 Cir. 1977, 559 F.2d 861; *Castel v. Moller, A.P.*, N.D.Cal. 1977, 441 F.Supp. 851; *Hite v. Maritime Overseas Corporation*, E.D.Tex., 1974, 380 F.Supp. 222, 226-27.

---

[5]The Comments explaining § 343(b) and § 343A(1) show that these limitations on liability are based upon the substance of the proscribed defenses of contributory negligence and assumption of risk. Section 343A, comment e, for example, explains that:

> In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, . . . and the dangers involved . . ., he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. *The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care,* [i. e., avoid contributory negligence] *or that he will voluntarily assume the risk of harm if he does not succeed in doing so.* Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.
> (emphasis added)

In like fashion § 343, comment b limits the possessor's duty simply to putting the invitee in a position where the invitee "may decide intelligently whether or not to accept the invitation [to encounter the danger], or may protect himself against the danger if he does accept it." *See also*, § 343, comment d, § 343A, comment d, and § 496C, comment d. *Cf.* W. Prosser, *The Law of Torts*, Sec. 61, 394 (4th Ed., 1971).

The Restatement's standard of care incorporates the proscribed defenses into its definition of the possessor's duty when it allows the possessor to count on his invitees to discover conditions, realize their dangers, and then protect themselves against the dangers. To apply the limitations of § 343(b) and § 343A(1) to negligence suits under the Amendments would violate the legislative intent behind

We also fear that these limitations on liability would undercut Congress' intention to reduce the frequency of accidents by creating economic incentives to provide safer working conditions. *Davis, supra,* 440 F.Supp. at 454-55; D. Robertson, "Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act," 7 *Journal of Maritime Law and Commerce* 447, 473.[6]

Secondly, the Supreme Court's decision in *Kermarec v. Compagnie General Transatlantique,* 1959, 358 U.S. 625,

---

§ 905(b) because it would, in substance if not in form, give defendant shipowners the benefits of a partial or absolute bar to liability having the characteristics of a defense based upon contributory negligence or implied assumption of risk or both. *Brown v. Ivarans Rederi A/S,* 3 Cir., 1976, 545 F.2d 854, 863-64, fn. 10; *Hurst v. Triad Shipping Co.,* 3 Cir., 1977, 554 F.2d 1237, 1250, fn. 35; *Davis, supra,* 440 F.Supp. at 453-55; *Gallardo, supra,* 435 F.Supp. at 494; *Espinoza v. United States Lines, Inc.,* S.D.N.Y., 1978, 444 F.Supp. 405, 410; *Shepler v. Weyerhaeuser Co.,* 1977, 279 Or. 477, 494-97, 369 P.2d 1040, 1050-51 (in banc); *The Injured Longshoremen, supra,* 28 *Hastings L.J.* 780-81; *cf. Gay v. Ocean Transport & Trading, Ltd.,* 5 Cir., 1977, 546 F.2d 1233, 1241-242.

From the point of view of an injured plaintiff, to use a definition of shipowner's duty which incorporates assumption of risk may well be worse than allowing the shipowner to plead assumption of risk as an affirmative defense. If assumption of risk came into play as an affirmative defense, the shipowner would have the burden of proving that the longshoreman assumed the risk. On the other hand, because the longshoreman has the burden of proving the shipowner's breach of duty, to incorporate absence of assumption of risk into the definition of duty would force the injured plaintiff to bear the burden of proving that he did not assume the risk. *See The Injured Longshoreman, supra,* 781, fn. 90.

[6]In urging us to affirm the district court's application of Restatement §§ 343(b) and 343A, Scindia relies heavily upon Judge Orrick's use of the business invitee standard in *Ramirez v. Toko Kaium K.K.,* N.D. Cal., 1974, 385 F.Supp. 644. We note that in *Gallardo v. Westfal-Larsen & Co.,* N.D. Cal., 1977, 435 F.Supp. 484, and in *Darwin v. United States,* N.D.Cal., 1977, 435 F.Supp. 501, Judge Orrick explicitly modified his *Ramirez* approach to reject the use of the business invitee standard. In many respects, our approach follows Judge Orrick's thoughtful analysis in *Gallardo.*

630-32, 79 S.Ct. 406, 3 L.Ed.2d 550, supports our selection of a "reasonable care under the circumstances" approach. *Griffith v. Wheeling-Pittsburgh Steel Corp.*, N.D.Pa., 1978, 452 F.Supp. 841, 844. In *Kermarec,* the plaintiff had come on board defendant shipowner's vessel to pay a social visit to a crew member. As he was leaving, the plaintiff injured himself in a fall caused by a defective stairway runner. The plaintiff then sued the shipowner, alleging unseaworthiness and negligence.

Both the Supreme Court and the lower courts began by ruling out any recovery based upon unseaworthiness, just as we must rule out an unseaworthiness recovery under § 905(b). The lower courts then set aside the plaintiff's jury verdict based upon negligence on the ground that the plaintiff had been a mere licensee rather than an invitee. A unanimous Supreme Court reversed. Refusing to incorporate the common law of invitees into admiralty, the Court set forth its own negligence standard:

> the owner of a ship . . . owes to all who are on board for purposes not inimical to his legitimate interests the *duty of exercising reasonable care under the circumstances of each case.* 358 U.S. at 632, 79 S.Ct. at 410. (emphasis added)

The Court saw the common law moving toward " 'imposing . . . a single duty of reasonable care in all circumstances' " 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550. It then explained that the real property tort law of invitees had been

> inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism, 358 U.S. at 630, 79 S.Ct. at 410.

and that in an effort to adopt that law to do justice in a modern industrialized society,

> common-law courts had found it necessary to . . . create . . . a semantic morass . . . [of] increasingly subtle verbal refinements, . . . subclassifications . . . [and] . . . fine gradations in the standards of care. 358 U.S. at 630-31, 79 S.Ct. at 410.

Invoking the admiralty tradition of "simplicity and practicality," the Court decided to spare the federal courts from having to join in the "confusion and conflict" by simply adopting the better rule towards which the common law was evolving, albeit "unevenly and with hesitation."

The *Kermarec* reasoning applies just as fully today, *Espinoza v. United States Lines, Inc.,* S.D.N.Y., 1978, 444 F.Supp. 405, 413-14, especially in light of the fact that the trend in the law of invitees relied upon in *Kermarec* has continued. *See, e.g., Rowland v. Christian,* 1968, 69 Cal.2d 108, 79 Cal.Rptr. 97, 443 P.2d 561. As Judge Orrick put it in *Gallardo:*

> [this] Court rejects resort to terminology which prevents inquiry into the reasonableness of conduct under the circumstances of a given case. Discussions relating to invitees, contractors, primary and second responsibilities, obviousness of dangers, and relinquishment of control all have the tendency to steer courts away from a balance of the risk of harm against the utility of the particular conduct in question. 435 F.Supp. at 496.

Accord, Griffith v. Wheeling-Pittsburgh Steel Corp., supra, 452 F.Supp. at 844.

Finally, because the legislative history of § 905(b) never refers to the Restatement and never used real property tort

law terms such as "invitee," we feel confident that our adoption of a "reasonable care under the circumstances" approach is not an "impingement upon legislative policy." *Kermarec, supra,* 358 U.S. at 630, fn. 5, 79 S.Ct. 406. *Accord, Gallardo, supra,* 435 F.Supp. at 492, 496; *Espinoza, supra,* 444 F.Supp. at 413-14; *cf. Brown v. Ivarans Rederi, A/S,* 3 Cir., 1976, 545 F.2d 854, 863.

While *Davison v. Pacific Inland Navigation Co., Inc.,* 9 Cir., 1978, 569 F.2d 507, 508-09, fn. 1, left "for another day" the defining of negligence and duty, that case and our earlier decision in *Wescott v. Impresas Armadoras, S. A. Panama,* 9 Cir., 1977, 564 F.2d 875, are both consistent with the standard that we adopt. In each, we held that, under the circumstances, there was no evidence that the shipowner knew or should have known of the dangers involved. It is also possible to read those cases as holding that the negligence of the longshoremen or the stevedore or both was the sole proximate cause of the injury. We cannot conclude as a matter of law that that is so in the case at bar.

In adopting the "reasonable care under the circumstances" standard, we cannot accept the idea that an injured longshoreman cannot recover because he should have demanded that the stevedore halt further loading operations until the stevedore could arrange to improve the working conditions. We agree with those courts which recognize that longshoremen "face trouble for delaying work." *Napoli v.* [*Transpacific Carriers, Etc.*] *Hellenic Lines,* 2 Cir., 1976, 536 F.2d 505, 509; *Davis, supra,* 440 F.Supp. at 452; *Gay v. Ocean Transport & Trading, Ltd.,* 5 Cir., 1977, 546 F.2d 1233, 1241, fn. 17, *reaffirming, Brock v. Coral Drilling, Inc.,* 5 Cir., 1973, 477 F.2d 211, 215.

[5] Under the rule of comparative negligence, the contributory negligence of an injured longshoreman reduces but does not preclude recovery. And in *Dodge v. Mitsui Shintaku Ginko KK Tokyo*, 9 Cir., 1975, 528 F.2d 669, and *Shellman v. United States Lines, Inc.*, 9 Cir., 1975, 528 F.2d 675, we held that "a longshoreman who has received injuries caused by the concurring negligence of his stevedore and the shipowner can recover the full amount of his damages from the shipowner." *Dodge, supra,* 528 F.2d at 673; *Shellman, supra,* 528 F.2d 679-81. Thus, the contributory negligence of the longshoreman's employer or fellow longshoremen will not preclude or diminish recovery through a theory of imputed contributory negligence. It is the longshoreman's own negligence that will reduce his recovery from the negligent vessel under the Amended Act.

IV. *The Standard Applied.*

[6] Having determined the standard of care required of a shipowner subject to an injured longshoreman's third party action under § 905(b), we must reverse the district court's summary judgment dismissing Santos' action. The following district court "findings" decided reasonably disputable factual issues against Santos. We reverse because these issues are material under the negligence standard set forth above, and cannot be decided on a motion for summary judgment.

[7] First, the district court found that the shipowner had not been told about the malfunctioning winch, did not know that it did not work properly, and could not reasonably have been expected to know that the winch was de-

fective. There was evidence, however, that the winch had malfunctioned for two days prior to the day of the accident, that the winch failed to stop properly with almost every load, that the shipowner's representatives had been back and forth in the vicinity of the loading operation during the two days prior to the accident, and that both the winch driver and the hatch tender had complained to superiors whose job it was to communicate problems to the shipowner's representatives in the vicinity of the loading operations. If members of the ship's crew knew, or should have known, about the allegedly defective condition of the winch, their actual or constructive knowledge is imputed to the vessel by respondeat superior. *See, e. g., Davis, supra,* 440 F.Supp. at 450-51; *Gallardo, supra,* 435 F.Supp. at 496.

[8] The standard set forth above recognizes that a shipowner ignorant of an unreasonably dangerous condition may be negligent in not protecting longshoremen against it, if "the exercise of reasonable care would [have] discover[ed] the condition." Within these bounds it is correct to say that the "shipowner [has] a duty to use reasonable care to provide a safe place to work." *Brown v. Ivarans Rederi A/S,* 3 Cir., 1976, 545 F.2d 854, 860, fn. 6(a); House Report at 4707, Senate Report at 10; *Solsvik v. Maremar Compania Naviera, S.A.,* W.D.Wash., 399 F.Supp. 712, 715. *Cf., West v. United States,* 1959, 361 U.S. 118, 123, 80 S.Ct. 189, 4 L.Ed.2d 161; *Migut v. Hyman Michaels Co.,* 6 Cir., 1978, 571 F.2d 352, 356; *Hess v. Upper Mississippi Towing Corp.,* 5 Cir., 1977, 559 F.2d 1030, 1033. By this we do not mean an absolute or non-delegable duty to

provide a safe place. That notion is gone with unseaworthiness. We only mean that under the circumstances of a particular case, failure to repair dangerous equipment or conditions may be negligent.

[9] A "shipowner's duties to the longshoremen . . . [do not] end when it turn[s] the vessel over to the stevedore in a safe condition." *Bess v. Agromar Line*, 4 Cir., 1975, 518 F.2d 738, 741-42, fn. 8. On the trial of this action, it may develop that the malfunctioning of the braking mechanism began only after the stevedore commenced loading operations. In this connection we note that while a less rigorous duty to inspect may apply where full inspection would interfere with the work of the stevedore, the duty to inspect does not automatically cease once stevedores have come aboard for the first time. *Slaughter v. Ronde,* S.D.Ga., 1974, 390 F.Supp. 637, *aff'd per curiam*, 5 Cir., 1975, 509 F.2d 973. *Compare Gallardo, supra,* 435 F.Supp. at 496; *Espinoza, supra,* 444 F.Supp. at 412-13. In Congress' example of the longshoreman slipping on the oily deck, Congress did not limit the phrase

> substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances

to oil spilled before the first longshoreman came aboard.

Second, the district court found that the stevedore had exclusive control of the gear and the premises during the relevant time period. Under the standard we have adopted, control would be relevant to the extent that it might limit

the shipowner's opportunities to inspect for dangerous conditions or to remedy such conditions. We agree that in some cases, control may play a critical role in determining the appropriate standard of care. Nevertheless, we do not follow those cases which have focused exclusively or primarily on whether the shipowner relinquished control of the stevedoring to the employer of the injured longshoreman. Instead, we focus on the reasonableness of the shipowner's conduct in the light of his practical opportunities to discover defective conditions and remedy them.[7]

Showing that the stevedore or Santos' fellow longshoremen had control to show their concurrent negligence would not be relevant after *Dodge, supra,* and *Shellman, supra,* unless that control could fairly be said to help prove a sole or superseding cause.

While the admitted facts portion of the pretrial order states that the stevedore was in "control of the loading," that stipulation would not require a jury to conclude that the stevedore had exclusive control of the gear and prem-

---

[7]Cases focusing on relinquishment of control include *Cox v. Flota Mercante Grancolombiana, S.A.*, 2 Cir., 1978, 577 F.2d 798; *Briley v. Charente S.S. Co., Ltd.*, 5 Cir., 1978, 572 F.2d 498, 500; *Hickman v. Jugoslavenska Linijska, Etc.*, 2 Cir., 1978, 570 F.2d 449, 451-52; *Hurst v. Triad Shipping Co.*, 3 Cir., 1977, 554 F.2d 1237, 1249-253; *Munoz v. Flota Merchante Grancolombiana, S.A.*, 2 Cir., 1977, 553 F.2d 837, 840-41. *See also, Restatement (Second) of Torts,* §§ 409, 414 (1965); *Talliercio v. A/S D/S Svenborg & D/S of 1912 A/S,* S.D.N.Y., 1978, 451 F.Supp. 949, 951-52; *Lemon v. Bank Lines, Ltd.,* S.D.Ga., 1978, 449 F.Supp. 1016, 1020-021; *Valle v. Jugoslavenska Linejska Provibda,* S.D.N.Y., 1977, 434 F.Supp. 608, 611-12; *Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk,* D.Ore., 1975, 398 F.Supp. 1224, 1229-231. *Cf. Chavis v. Finnlines, Ltd.,* O/Y, 4. Cir., 1978, 576 F.2d 1072, 1079-080, *quoting Riddle v. Exxon Transportation Company,* 4 Cir., 1977, 563 F.2d 1103, 1111-112; *Teofilovich v. d'Amico Mediterranean Pacific Lines,* C.D.Cal., 1976, 415 F.Supp. 732,739.

ises. From the record before us, it is not at all clear that the shipowner did not maintain ultimate control over the ship and its gear during the loading. Far from concluding that *only* the stevedore could have had the defective winch repaired, we cannot be certain from the record that the stevedore had *any* authority to repair it.

Third, the district court held that the initial spillage was "caused by the pallet striking the pallet jack." Santos argued the broader view that the defective braking mechanism caused the initial spillage by failing to stop the pallet before it struck the pallet jack. Since the winch driver's deposition testimony supports this broader view, the importance of the braking mechanism as a "cause" of the initial spillage should have been left for the jury.

Fourth, the district court emphasized that after the longshoremen raised the partially spilled pallet they left it to swing back and forth overhead. The amount of swinging, if any, matters a great deal because Santos claims that the remaining sacks of wheat did not loosen because the pallet swung back and forth but because the winch's defective braking mechanism let the pallet keep creeping down, thus requiring the winch driver to keep jerking the pallet back up to the desired height. Since some of the deposition testimony suggested little if any swinging, the amount of swinging as compared with the amount of vertical movement caused by the allegedly defective winch should have been left for the jury.

Finally, the district court applied Restatement (Second) § 343 and § 343A which, as we have seen, incorporate the substance of the defenses of contributory negligence and

assumption of risk. In applying those sections, the court concluded that the "jumpiness" of the winch was open and obvious, and that both because the plaintiff's activities were dangerous, and because the plaintiff recognized some of the dangers, he could not recover as a matter of law. These findings also require reversal. They demonstrate that the district court actually relied upon the limiting provisos, §§ 343(b) and 343A, in deciding to grant summary judgment. Thus, its mistaken view of the law cannot be said to have been harmless error.[8]

As an alternate ground of decision, the district court concluded that the "defective condition of the winch had only a remote cause-in-fact relationship to plaintiff's accident and could not have been the proximate cause thereof as a matter of law." Because the district court based this conclusion in part on factual findings which we have just indicated should have been left for trial, we cannot sustain the district court's dismissal on this alternate ground. We thus do not consider whether, if we had sustained the factual findings, we would have agreed that the defective condition could not have been found a proximate cause of the accident as a matter of law.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

---

[8]We note that the standard we adopt today is very similar to the standard set forth in Restatement (Second) of Torts § 343 and § 343A, minus the limitations placed on recovery under those provisions by § 343(b) and § 343A(1). Had the district court not relied on the limiting provisions of the Restatement invitee rule, the error of law may have been harmless. However, as we have noted, the district court did rely on the limiting provisos.

Appendix C

United States Court of Appeals
For the Ninth Circuit

Lauro de los Santos, Appellant, vs. Scindia Steam Navigation Co., Ltd., Appellee, Seattle Stevedore Co., Intervenor.	No. 76-3225 OPINION

[June 28, 1979]

On Petition for Rehearing

Before: DUNIWAY and CHOY, Circuit Judges,
and Grant,* District Judge

Per Curiam:

In its petition for a rehearing and suggestion of a rehearing in banc, appellee Scindia calls our attention to the fact that *Anderson v. Iceland Steamship Co.*, D. Mass., 1977, 431 F. Supp. 869, was reversed by the First Circuit, 1978, 585 F.2d 1142. However, the First Circuit expressly declined to adopt Restatement (Second) of Torts, §§ 343 and 343A as the standard of care, because the injury occurred on the dock, not on the ship. The court looked to § 414A of the

*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

Restatement, which deals with a landowner's liability for activities dangerous to those outside the land. In commenting on Restatement §§ 343 and 343A the court said that they incorporate "the defenses of contributory negligence and assumption of risk." (p. 1147) That is precisely the reason why we do not adopt them as the appropriate standard in this case.

In our opinion, we said that the Second, Fourth and Fifth Circuits "have defined 'negligence' in terms of a landlord's duty to invitees under Restatement (Second) of Torts, § 343 and § 343A." Scindia says that we should add the First, Third, Seventh and probably the Sixth Circuits to the list. Scindia is right about the Seventh, *Clemons v. Mitsui O.S.K. Lines, Ltd.*, 7 Cir., 1979, ... F.2d ..... (No. 78-1812, April 16, 1979). Scindia is wrong about the others.

As to the First Circuit, it cites *Anderson v. Iceland Steamship Co., supra,* which expressly does not adopt §§ 343 and 343A. As to the Third, Scindia cites *Marant v. Farrell Lines, Inc.*, 3 Cir., 1977, 550 F.2d 142, and *Hurst v. Triad Shipping Co.*, 3 Cir., 1977, 554 F.2d 1237. Neither case is in point. *Marant* does not mention §§ 343 and 343A at all. *Hurst* expressly declines to rely on §§ 343 and 343A. See fn. 35, 554 F.2d at 1248. It uses §§ 409-29, which deal with an employer's duty to control the activities of an independent contractor. As to the Sixth, Scindia cites *Migut v. Hyman-Michaels Co.*, 6 Cir., 1978, 571 F.2d 352, 356. It is obviously not in point. There, the shipowner's liability to the longshoreman had been settled, and the

question was whether the shipowner or the charterer should bear the cost. The opinion in the case does not mention §§ 343 and 343A.

The petition for a rehearing is denied.

The suggestion of a rehearing in banc has been transmitted to the judges who are in regular active service, and no judge in regular active service, or judge who was a member of the panel, has requested a vote on the suggestion.

The suggestion of a rehearing in banc is rejected.

Supreme Court, U.S.
FILED
JUL 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-512

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

vs.

LAURO DE LOS SANTOS and SEATTLE STEVEDORE CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

GRAYDON S. STARING
Two Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 421-4600
Attorney for Petitioner

JAMES A. GRUTZ
1425 IBM Building
Seattle, Washington 98101
Telephone: (206) 623-2300
Attorney for Respondent Lauro de los Santos

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7852

(2)

No. 79-512

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

VS.

LAURO DE LOS SANTOS and SEATTLE STEVEDORE CO.,
Respondents.

JOINT APPENDIX

TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entities	1
Complaint in the District Court	3
Answer in the District Court	8
Pre Trial Order of the District Court	10
Judgment of the District Court	24
Judgment of the Court of Appeals (Amended Mandate as to Costs)	25

The following opinions have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Writ of Certiorari:

	Page of Appendices to Petition
A. Opinion of District Court Granting Defendant's Motion for Summary Judgment	A-1
B. Opinion of the Court of Appeals	B-1
C. Opinion of the Court of Appeals Denying Rehearing	C-1

RELEVANT DOCKET ENTRIES:

U.S. DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON

1974	
November 27	Filed complaint and issued summons.
1975	
October 23	Filed deposition of Lauro de los Santos.
December 11	Filed answer.
1976	
March 24	Filed petition in intervention, Seattle Stevedore Co.
March 31	Filed deposition of Lester Hawran. Filed deposition of Alvin H. Botler.
April 23	Filed pretrial order.
April 27	Filed motion for summary judgment.
June 4	Defendant Scindia's motion for summary judgment under advisement.
September 1	Filed and entered memorandum and order granting summary judgment of dismissal. Filed and entered judgment granting defendant's motion for summary judgment.
September 3	Filed motion to reconsider and/or alter judgment.
September 27	Entered order noting on the Court's own motion, plaintiff's motion to reconsider and/or alter judgment to be set for today. Entered order denying plaintiff's motion to reconsider and/or alter judgment.
September 28	Filed plaintiff's notice of appeal.

U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

1976	
October 18	Docketed cause and entered appearances of counsel.
December 17	Filed 25 appellant's opening briefs. (12/16/76)
1977	
February 8	Filed 25 appellee's briefs. (2/7/77)
July 14	Filed as of 7/11/78, appellant's additional authorities. (received 6/26)
July 20	Argued and submitted to Duniway, Choy, CJJ and Grant, DJ.
1979	
May 2	As of May 1, ordered opinion filed (Duniway) and judgment to be filed and entered. As of May 1, filed opinion—reversed and remanded. As of May 1, filed and entered judgment.
May 15	Filed original and 24 appellee's petition for rehearing and request for rehearing en banc. 5/15
July 6	As of June 28, ordered opinion (per curiam) on petition for rehearing filed and judgment to be filed and entered. As of June 28, filed opinion—the petition for rehearing is denied. The suggestion for a rehearing en banc is rejected. As of June 28, filed and entered judgment.

United States District Court
Western District of Washington
at Seattle

No. C74-720S

COMPLAINT

JURY DEMAND

Comes now the plaintiff and for cause of action against the defendant sets forth and alleges as follows:

I.

That at all times herein mentioned the defendant Scindia Steam Navigation Co., Ltd. of Bombay, India was the owner of the M/S JALARATNA, which vessel at all times herein mentioned was engaged in the transportation of cargo in foreign commerce from the country of India and the Far East to ports of the United States and at all times herein mentioned was represented by Transmarine Navigation Corp., agent, for the transaction of its business at Seattle, Washington.

II.

That on or about December 10, 1972 plaintiff was employed as a longshoreman by the Seattle Stevedoring Co. on the vessel M/S JALARATNA which vessel was moored at Fisher Flouring Mills dock, engaged in loading sacks of bulgar wheat for the Far East. That plaintiff and other longshoremen were assigned to said vessel and were working the night shift in the No. 3 hatch, lower hold, stowing sacks of bulgar wheat which were being brought aboard said vessel on pallet boards by the winches, 70 sacks in a load, each sack weighing about fifty pounds. That at about

8:45 PM a load of bulgar was brought aboard the vessel into the No. 3 hatch and while the load was being lowered several sacks fell off the load into the square of the hatch, which sacks broke and scattered the bulgar in the square of the hatch. That plaintiff was ordered to clean up the broken sacks of bulgar in the square of the hatch and while he and his partner were so engaged the balance of the load which the winch was attempting to hold in the upper part of the hatch, but because of the instability of the winch, three or four additional sacks fell from the load being so held and struck the plaintiff on the head, neck and upper back, causing injuries to his head, neck, cervical spine and back.

III.

That the proximate cause of the injuries and damages to the plaintiff was the carelessness and negligence of the defendant and/or defendant's employees of the vessel M/S JALARATNA in the following particulars:

(1) In the failure of defendant to provide the plaintiff with a safe place to work aboard said vessel in and about the hatch where plaintiff was employed at the time of the accident.

(2) In the failure of defendant to properly supervise the loading of the sacks of bulgar onto the pallet boards and the lifting of the pallet boards by the winch into the No. 3 hatch of said ship at the time of the accident when defendant knew, or should have known, that the sacks of bulgar were not properly secured on the pallet boards when having said load lifted by the winch which was unstable and was unable to properly control the load of bulgar

which was being lifted into the hatch at the time of the accident and the injuries to the plaintiff.

(3) In the defendant in permitting the sacks of bulgar to fall and drop onto the plaintiff who was employed in the hatch area cleaning up the broken sacks of bulgar which had fallen into the hatch.

IV.

That as a proximate result of the negligence and carelessness of the defendant and/or defendant's employees, as alleged herein, plaintiff sustained severe injuries to his neck, including fractures of the spinous processes of his cervical spine and injury to the dorsal spine, shoulders, arms and head, damage to the vertebral bodies and the discs of the cervical spine with injury to the muscles, nerves and tissues. That the injury to plaintiff's head caused plaintiff to suffer a concussion of the brain and severe headaches. As a result of said injuries to plaintiff's head, neck, cervical and dorsal spine and body he was removed from the job and taken to the hospital where he was treated for a substantial period of time and was then released from the hospital to rest for a couple of months. Plaintiff then attempted to return to employment and in the course of his employment he continued to work under pain and distress of his neck, cervical spine and head and finally his condition grew worse and he had to leave his employment. In April, 1974 he had to return to the hospital where a myelogram was performed on his cervical spine which demonstrated a severe defect in the area of the Cervical 5-6 vertebra. On April 17, 1974 an anterior cervical disectomy and fusion was carried out at Saint Frances

Cabrini Hospital, Seattle. That as a result of said injuries to his neck and cervical spine plaintiff has continued to have pain and distress and restriction of motion of his spine and that he works under a handicap because of the pain and distress and limitation of mobility of his spine. At the time of injury plaintiff was 52 years of age and was employed as a longshoreman earning and capable of earning the sum of $1,000 per month. That by reason of said injuries the plaintiff has sustained loss of earnings and will continue to sustain loss of earnings and wage earning capacity for a long time in the future. That as the result of said injuries, the pain and suffering plaintiff has experienced since the time of the accident, his future pain and suffering, his loss of earnings, future loss of earnings, and the permanent disability that he has sustained as the result of said injuries to his neck, spine and head, plaintiff has been damaged in the sum of $150,000.00.

V.

That as a proximate result of the negligence and carelessness of the defendant and/or defendant's employees, as alleged herein, plaintiff has incurred medical and hospital expenses to date in the approximate amount of $2,500.00 and plaintiff requests permission to amend his pleadings at the time of trial to accurately set forth the total amount of medical and hospital expenses he has incurred as a result of the injuries described herein.

VI.

That as a proximate result of the negligence and carelessness of the defendant and/or defendant's employees, as alleged herein, plaintiff sustained loss of earnings from the

time of injury to the present in the amount of approximately $7,500.00 and that he will continue to have loss of earnings in the future. Plaintiff requests permission to amend his pleadings at the time of trial to accurately set forth the total amount of his loss of earnings as established by the evidence.

WHEREFORE, plaintiff prays for judgment against the defendant as follows:

1. General damages in the amount of $150,000.00;

2. Special damages in the amount of $10,000.00, together with what other and further special damages may be established at the time of trial;

3. For his costs and disbursements herein incurred.

JACKSON, ULVESTAD, GOODWIN
& GRUTZ

United States District Court
Western District of Washington
at Seattle

No. C74-720S

ANSWER

COMES NOW the defendant and in answer to plaintiff's complaint, admits, denies and alleges as follows:

I

Answering paragraph I of plaintiff's complaint, defendant admits it was the owner of the JALARATNA, which vessel was engaged in the transportation of cargo in foreign commerce. Except as so admitted, defendant denies all other allegations in said paragraph.

II

In answer to paragraph II of plaintiff's complaint, defendant admits that on or about December 10, 1972 plaintiff was employed as a longshoreman by Seattle Stevedoring Co. aboard the JALARATNA which was moored at Fisher Flour Mill and that sacks of bulgar wheat were loaded in hatch No. 3 by longshoremen. Except as so admitted, defendant denies each and every allegation contained in paragraph II of plaintiff's complaint.

III

Answering paragraph III, IV, V and VI of plaintiff's complaint, defendant denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

By way of further answer and in affirmative defense of plaintiff's claim, defendant further alleges:

IV

If plaintiff suffered any injury while aboard the JALARATNA as alleged, said injury was caused solely by the negligence of plaintiff

V

Plaintiff's action is barred by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.

WHEREFORE, having fully answered the allegations of plaintiff's complaint, defendant prays that said complaint be dismissed with prejudice and that defendant recover its costs, disbursements and attorneys' fees herein.

Dated this 9th day of December, 1975.

HOWARD, LE GROS,
BUCHANAN & PAUL

United States District Court
Western District of Washington
at Seattle

No. C74 720S

PRE TRIAL ORDER

As a result of pretrial conference heretofore had, whereat plaintiff was represented by Roy E. Jackson, of the firm of Jackson, Ulvestad, Goodwin & Grutz, and the defendant was represented by Howard, Le Gros, Buchanan & Paul, Robert H. Madden of counsel and the Intervenor, Seattle Stevedore Co. was represented by Williams, Lanza, Kastner & Gibbs, Paul C. Gibbs of counsel, the following issues of fact and law were framed and exhibits identified:

JURISDICTION

Jurisdiction is vested in this court by virtue of diversity of citizenship, 28 U.S.C.A. § 1332 and § 1333, with the right of jury trial on the civil side of the court.

ADMITTED FACTS

The following facts are admitted by the parties:

1. That on about December 10, 1972, plaintiff, Lauro de los Santos, was employed as a longshoreman by Seattle Stevedoring Company aboard the vessel M/S JALARATNA, which vessel was moored at the Fisher Flouring Mills dock in Seattle, engaged in loading sacks of bulgar wheat for the Far East.

2. That the defendant Scindia Steam Navigation Co. Ltd. of Bombay, India, is and was at all times material herein the owner of the vessel M/S JALARATNA.

3. That plaintiff, Lauro de los Santos, was working as a longshoreman on the night shift in the No. 3 hatch, commencing at 7:00 P.M. on December 10, 1972, engaged in stowing the sacks of bulgar wheat being brought in by the winch into said hatch and worked continuously in the No. 3 hatch from 7:00 P.M. until his accident at 8:45 P.M.

4. A short time prior to the accident a pallet board containing about 70 sacks of bulgar wheat, each sack weighing about 50 pounds, was lowered into the No. 3 hatch, struck the pallet jack, spilling about half of the sacks into the hatch.

5. Following the spilling of the sacks from the pallet board, the balance of the load was lifted by the winch-driver, upon the instructions of the hatchtender, who was supervising the loading operation, about fifteen feet to the coaming of the hatch and held there while plaintiff and his fellow worker were engaged in cleaning up the spilled sacks from the deck of the hatch.

6. After about ten minutes, while plaintiff and his fellow worker were still engaged in cleaning up the spilled sacks of wheat, several more sacks fell from the raised pallet board into the No. 3 hatch, striking plaintiff and injuring him.

7. That Seattle Stevedore Company, plaintiff's employer, was engaged by defendant as an independent contractor, to load the vessel and that Seattle Stevedore Company, through its employees, and particularly the foreman, hatchtender and winchdriver, was in control of the loading at the No. 3 hatch on the evening of plaintiff's accident.

DISPUTED FACTS

The plaintiff contends as follows:

(a) Plaintiff denies each contention of the defendant not specifically admitted herein.

(b) That on the evening of December 10, 1972, plaintiff Lauro de los Santos, along with Lester Hawran, Alvin H. Botler and James B. Garrett, was assigned to work as longshoremen aboard the vessel M/S JALARATNA, while said vessel was moored at the Fisher Flouring Mills dock and engaged in loading bulgar wheat for the Far East.

(c) That upon arriving at the vessel the plaintiff and his fellow longshoremen were assigned to loading the No. 3 hatch with bulgar wheat, working the night shift.

(d) That the sacks of bulgar wheat, weighing about 50 pounds each, were brought aboard the vessel by electric winch on pallet boards carrying about 70 sacks in a load.

(e) That at about 8:45 P.M. Lester Hawran was operating the winch, which winch was about 35 feet above the No. 3 hatch located in such a position that the winch driver could not observe the men working in the No. 3 hatch.

(f) That a pallet load of bulgar was being lifted into the hatch from the dock by the winch operated by Lester Hawran and as the load was being lowered into the hatch the brakes on the winch failed permitting the load to strike with great force the pallet jack in the hold on which it was to be positioned, resulting in half of the sacks to fall off the pallet board. That in order to clean the runway for the pallet jack the hatchtender had the balance of the load lifted up to near the hatch coaming to be held there until

plaintiff and James B. Garrett could move the spilled sacks from the area where they had fallen into the hatch.

(g) That during the period of time the load was being held by the winch near the hatch coaming waiting for the spilled sacks to be cleared from the hatch runway, the winch operator was having difficulty with the creeping faulty winch, which permitted the load on the pallet board to move up and down. That after the load was held in that position for about ten minutes several of the sacks on the pallet board became loose and dropped into the hold and struck plaintiff on the neck and back, causing injuries to his neck, back and spine.

(h) That as a result of the injuries sustained by plaintiff an accident report was filed in his behalf.

(i) That plaintiff underwent medical treatment for the severe injuries to his neck, including fractures of the spineous processes of his cervical spine, injury to his dorsal spine, shoulders, arms and head, damage to the vertebral bodies and the discs of the cervical spine with injury to the muscles, nerves and tissues. That the injury to his head caused plaintiff to suffer a concussion of the brain and severe headaches. That as a result of his injuries plaintiff was taken to the hospital where he was treated for a period of time and then released to rest at home for a couple of months.

(j) That plaintiff attempted to return to employment, but continued to suffer pain and distress in his neck, cervical spine and head. His condition grew worse and he was forced to leave his employment.

(k) In April, 1974 plaintiff returned to the hospital where a myelogram was performed on his cervical spine which demonstrated a severe defect in the area of the cervical 5-6 vertebra. On April, 1974 an anterior cervical disectomy and fusion was carried out at Saint Frances Cabrini Hospital in Seattle.

(l) That plaintiff, as a result of said injuries, continues to have pain and distress and restriction of motion of his spine and works under a handicap because of the pain and distress and limitation of mobility of his spine.

(m) That at the time of his injury plaintiff was 52 years of age, earning and capable of earning $1,000.00 per month.

(n) That as the result of his injuries, the pain and suffering he has experienced from the time of the accident, his future pain and suffering, his loss of earnings and future loss of earnings, and the permanent disability that he has sustained plaintiff has been damaged in the sum of $150,000.00.

(o) That plaintiff has sustained loss of earnings as the result of his injuries in the amount of approximately $10,000.00 and he will continue to suffer loss of earnings in the future.

(p) That as a result of his injuries plaintiff has incurred hospital and medical expenses in the amount of approximately $3,500.00.

(q) That the injuries experienced by plaintiff were the proximate result of the negligence and carelessness of the defendant and/or defendant's employees in the following particulars:

(1) In failing to provide plaintiff with a safe place to work aboard the vessel M/S JALARATNA.

(2) In permitting the loading of sacks of bulgar wheat aboard the vessel using faulty and malfunctioning winch in the course of the loading operation.

(3) In permitting a winch to be faulty and malfunctioning when holding a part of the load of bulgar on the pallet board, which faulty and malfunctioning winch permitted the sacks to fall from the pallet board into the hatch and strike plaintiff.

(4) In operating and permitting the operation of a defective winch when defendant knew or should have known that the winch was defective and would cause injury to plaintiff.

(5) In the failure of defendant to have said faulty and malfunctioning winch repaired before starting the loading operation when defendant knew, or should have known, that the failure to repair the winch would cause injury to longshoremen employed in loading the vessel, particularly the plaintiff.

(4) The defendant contends as follows:

(a) Defendant denies each and every allegation of plaintiff not specifically admitted herein.

(b) Plaintiff's accident was caused by his own negligence in the following regards:

(1) in knowingly working under a swinging, suspended pallet load of loose, disarranged sacks of wheat which he knew, or reasonably should have known, to be unsafe, in utter disregard for his own safety;

(2) in failing to keep a lookout for his own safety from the pallet load overhead;

(3) in failing to make sure that one of his fellow longshoremen was keeping a lookout for his safety;

(4) in failing to unload sacks remaining on the pallet before the pallet was raised;

(5) in failing to make sure that the sacks on the pallet were properly secured before the pallet was raised;

(6) in failing to see to it that the remaining pallet load was removed to a safe place—either in the hold, or on the deck, or on the dock—before commencing to pick up the spilled sacks.

(c) Plaintiff's accident, in combination with plaintiff's own negligence, was caused by the negligence of plaintiff's fellow longshoremen, and in particular the winch driver and hatch tender, in the following regards:

(1) in instructing or permitting plaintiff to work underneath a swinging pallet load of loose, disarranged sacks of cargo which they knew, or reasonably should have known, to be unsafe;

(2) in failing to warn plaintiff of the danger of working under the pallet;

(3) in failing to keep a proper lookout for plaintiff's safety while working;

(4) in failing to unload the sacks remaining on the pallet before raising it;

(5) in failing to secure the sacks remaining on the pallet before raising it;

(6) in failing to remove the remaining pallet load to a safe place, such as elsewhere in the hold, or on

the ship's deck, or on the dock, before instructing or permitting plaintiff to clean up the spilled sacks.

(d) Defendant denies that the ship's winches were defective or in any way contributed to the accident. However, even if the winches had previously worked with difficulty as is apparently alleged by plaintiff and his fellow longshoremen, then with such condition known and obvious to plaintiff and his fellow workers for nearly an hour and 45 minutes before the accident, it became all the more incumbent upon plaintiff and his fellow workers to avoid working under the suspended pallet load. The accident was easily avoidable by any number of means within the exclusive control of plaintiff and/or his fellow workers, and the negligence of plaintiff and his fellow workers was a supervening, superceding cause of the accident whatever the condition of the winches.

(e) Seattle Stevedore Co., plaintiff's employer, was engaged by defendant as an independent contractor, expert in loading the vessel, and was in exclusive possession, control, and supervision of #3 hatch and loading operations being conducted there on the evening of the accident.

(f) Plaintiff voluntarily assumed the risk of injury when he commenced working under the suspended pallet load, knowing the sacks remaining thereon to be loose and disarrayed, and believing the ship's winches to be defective and unsafe.

ISSUES OF FACT

The following are the issues of fact to be determined by the jury:

1. Was the defendant and/or its employees careless and negligent, as contended by plaintiff?

2. Were the winches being operated at the time of plaintiff's injury faulty and defective? If so, did such faulty and defective winches contribute to plaintiff's injury?

3. Was plaintiff contributorily negligent as contended? If so, by what percentage should any award to the plaintiff be reduced because of the contributory negligence?

4. What are plaintiff's damages proximately resulting from the carelessness and negligence of the defendant and/or its employees, if any?

5. Was plaintiff's accident caused by the negligence of his fellow longshoreman? If so, should intervenor be denied recovery of its claimed lien due to its "unclean hands?"

6. Did plaintiff assume the risk of his own injury in working under a suspended pallet load of cargo which he knew, or reasonably should have known, to be unsafe?

7. Was plaintiff negligent per se in working under a suspended pallet load of cargo which he knew, or reasonably should have known, to be unsafe and in violation of longshore safety regulations?

Plaintiff objects to Issues Nos. 5, 6 and 7 for the reason that they are not applicable because they are not germain to the issues involved in this case. Assumption of risk is not an issue under the General Maritime Law. Plaintiff's injuries were caused by faulty and defective winches which were used at the time of loading sacks of bulgar

wheat during the loading operation and, further, that plaintiff was not negligent per se.

ISSUES OF LAW

The following are the issues of law to be determined by the court:

1. The issues of law will be those arising in applying the maritime law to the facts of the case.

EXPERT WITNESSES

The names and addresses of the expert witnesses to be used by each party at the trial are as follows:

(1) On behalf of plaintiff:

(a) Expert witness on the maintenance and repair and operation of winches, name to be supplied.

(2) On behalf of defendant:

(a) Physician to examine plaintiff prior to trial, name to be supplied.

(b) Expert on longshore safety practices, name to be supplied.

OTHER WITNESSES

The names and addresses of witnesses, other than experts, to be used by each party at the time of trial, and the general nature of the testimony of each, are:

(a) On behalf of plaintiff:

1. Plaintiff, Lauro de los Santos
2. Alvin H. Botler,
   834 N. E. 195th,
   Seattle, Washington.

3. A. Bernard Gray, M. D.
   704 Cobb Medical Center,
   Seattle, Washington.

4. James B. Garrett,
   2327 44th S. W.
   Seattle, Washington.

5. John C. Gibson, M. D.
   1120 Cherry Street,
   Seattle, Washington.

6. Edward Reifel, M. D.
   The Mason Clinic,
   1118 Ninth Avenue,
   Seattle, Washington.

7. Foreman, McNaughton

8. Lester Hawran,
   347 N. W. 87th,
   Seattle, Washington 98107.

(b) On behalf of defendant:

1. Any witness named, but not called by plaintiff.

2. Ship's master (if available)

3. Ship's chief officer (if available)

EXHIBITS

(a) The exhibits listed below may be received in evidence without objection:

PLAINTIFF'S OBJECTIONS

1. Report of accident made to Bureau of Employees Compensation following injury of December 10, 1972;
2. Copy of logbook of the vessel M/S JALARATNA for the month of December, 1972;
3. Hospital records of Virginia Mason Hospital;
4. Hospital records of St. Frances Cabrini Hospital;
5. X-rays taken at Virginia Mason Hospital;
6. X-rays taken under direction of Dr. John Gibson;
7. X-rays taken under direction of Dr. A. Bernard Gray;
8. OSHA Regulations, Maritime and Longshoremen;
9. Plaintiff's earning records for the years 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975 and 1976 to date;
10. PMA earning records;
11. Bills incurred by the plaintiff covering his care and treatment:

The Mason Clinic	$ 444.25
St. Frances Cabrini Hospital	1,254.94
A. Bernard Gray, M.D.	373.50
John Gibson, M.D.	770.00
Virginia Mason Hospital	599.90
Drug Bills	

DEFENDANT'S EXHIBITS

A-1 PMA Safety Code

A-2 Supercargo daily report for night shift 12/10/72 (if available)

A-3 Stevedore Hatch logs for night shift 12/10/72 (if available)

A-4 Capacity plan for JALARATNA

(b) Admissibility of the following exhibits is denied for the reasons set forth in respect to each exhibit:

DEFENDANT'S EXHIBITS

A-5 Certified copy of complaint in De Los Santos v. Matson Navigation Cause #258 71C2

A-6 Copy of release in De Los Santos v. Matson Navigation, Cause #258 71C2.

Reason—plaintiff does not deny he sustained previous injury and was compensated therefore. Irrelevant and self serving.

(c) The authenticity of the exhibits listed below is denied. It is also contended the exhibits are inadmissible for additional reasons set forth in respect to each exhibit:

PLAINTIFF'S EXHIBITS

12. Sketch of the vessel M/S JALARATNA illustrating area where plaintiff was injured and illustrating the location of the winch involved.

Reason—hearsay, inaccuracies, lack of foundation, self-serving, qualification of drawer, irrelevant.

ACTION BY THE COURT

The Court has ruled that:

(a) Trial briefs shall be submitted to the court on or before May 5, 1976.

(b) Jury instructions requested by any of the parties shall be submitted to the Court on or before May 5, 1976.

(c) Suggested questions of any party to be asked the jury by the court on voir dire shall be submitted to the court on or before May 5, 1976.

(d) That Seattle Stevedore has a lien in the amount of $9,046.76.

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signature of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case and this Pretrial Order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

DATED this 22nd day of April, 1976.

Walter T. McGovern
United States District Judge

Form Approved:

Roy E. Jackson
Jackson, Ulvestad, Goodwin & Grutz
Attorneys for plaintiff

Howard, Le Gros, Buchanan & Paul

By Robert H. Madden
Attorneys for defendant

Williams, Lanza, Kastner & Gibbs

By Paul C. Gibbs
Attorneys for Intervenor.

United States District Court
Western District of Washington
at Seattle

No. C74-720S

JUDGMENT

This matter having come on for consideration before the Court, Honorable Walter T. McGovern, Chief United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, granting defendant's Motion for Summary Judgment of Dismissal,

IT IS HEREBY ORDERED AND ADJUDGED, this case is hereby dismissed.

Dated this 1st day of September, 1976.

JOHN A. McLELLAN
Deputy United States District
Court Clerk

United States Court of Appeals
For the Ninth Circuit

No. 76-3225
DC CV 74-720S McG

JUDGMENT

Amended Mandate as to Costs—07/25/79

Appeal from the United States District Court for the Western District of Washington (Seattle).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this cause be, and hereby is reversed and remanded. Costs in this court in favor of the appellant and against the appellee.

Costs:

Brief for the Appellant	$682.02
Total	$682.02

Filed and entered May 1, 1979.

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-512

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

v.

LAURO DE LOS SANTOS AND SEATTLE STEVEDORE CO.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JAMES A. GRUTZ
JACKSON, ULVESTAD,
GOODWIN & GRUTZ

Attorneys for Respondent,
Lauro De Los Santos

Office and Post Office Address:

1425 IBM Building
Seattle, Washington 98101

CRAFTSMAN PRESS SEATTLE, WASHINGTON

(3)

TABLE OF CONTENTS

	Page
Questions Presented	1
Statement of the Case	2
Assumption of the Risk—Comparative Negligence—Concurrent Negligence	3
Considerations In Granting the Writ	9

TABLES OF AUTHORITY

Table of Cases

Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978)	9
Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757, 1976 Am. Mar. Cas. 2048 (4th Cir. 1976)	9
Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 1978 Am. Mar. Cas. 1920 (2d Cir. 1978)	7
Chavis v. Finnlines Ltd., 576 F.2d 1072 (4th Cir. 1978)	9
Clemons v. Mitsui O.S.K. Lines, Ltd., and Baba-Daiko Shosen, K.K., 596 F.2d 746 (7th Cir. 1979)	8
Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F.2d 669 (9th Cir. 1975), *cert. denied*, 425 U.S. 944, 48 L. Ed. 2d 188, 96 S. Ct. 1685 (1976)	5
Edmonds v. Compagnie Generale, ... U.S. ....., 61 L. Ed. 2d 521, 99 S. Ct. 2753 (1979)	5
Gay v. Ocean Transport & Trading Ltd., 546 F.2d 1233 (5th Cir. 1977)	8
Griffin v. Wheeling-Pittsburgh Steel Corp., ... F.2d ..... (3d Cir. 1979)	7
Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 3 L. Ed. 2d 550, 79 S. Ct. 406 (1959)	7, 9, 10
Matthews v. Ernst Russ Steamship Co. and M/V Tilly Russ, etc., ... F.2d ..... (7th Cir. 1979)	8

Page

Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 1976 Am. Mar. Cas. 551 (2d Cir. 1976) 7

Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962).. 3

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 98 L. Ed. 143, 74 S. Ct. 202 (1953) 4

Shellman v. U.S. Lines, Inc., 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936, 48 L. Ed. 2d 177, 96 S. Ct. 1668 (1976) 5

Socony-Vacuum Oil Company v. Smith, 305 U.S. 424, 83 L. Ed. 265, 59 S. Ct. 262 (1939) 4

The Max Morris, 137 U.S. 1, 34 L. Ed. 586, 11 S. Ct. 29 (1890) 4

Wiles v. Delta Steamship Lines, Inc., 574 F.2d 1338, 1978 Am. Mar. Cas. 2427 (5th Cir. 1978) 8

Other Authority

Fed. R. Civ. P. 56 1

H. Rep. No. 92-1441, 92d Cong., 2d Sess., *3 U.S. Code Cong. and Ad. News* (1972) 4-5, 6

Restatement (Second) of Torts, §§ 343, 343A 4, 8, 9, 10

S. Rep. No. 92-1125, 92d Cong., 2d Sess., *3 U.S. Code Cong. and Ad. News* (1972) 5, 6

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-512

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

v.

LAURO DE LOS SANTOS AND SEATTLE STEVEDORE CO.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Was the court of appeals correct in holding that there were material questions of fact, or inferences to be drawn from the underlying facts, which could not be decided on motion for summary judgment under Fed. R. Civ. P. 56?

2. Was the court of appeals correct in deciding that the 1972 amendments to the Longshoremen's and Harbor-workers' Compensation Act did not substitute assumption of risk and contributory negligence principles for the Admiralty concept of comparative negligence?

3. Was the court of appeals correct in deciding that the contributory negligence of a longshoreman's employer or fellow employee will not preclude or diminish recovery through some theory of imputed contributory negligence?

This is not a case of imposing on a shipowner the duty of countermanding a stevedore's work methods as argued by petitioner. This is a case of a shipowner's negligent failure to maintain its own ship's winch in proper working condition even though it had ample opportunity to discover and remedy the malfunction of the winch.

STATEMENT OF THE CASE

This is a personal injury action brought by Lauro De Los Santos, a longshoreman. The complaint alleged that Santos was injured on December 10, 1972, as a proximate result of the negligence of the shipowner in providing the longshoremen with a faulty and malfunctioning winch, in failing to have the faulty and malfunctioning winch repaired prior to the time of the accident, and in failing to provide Santos with a safe place to work aboard the vessel M/V JALARATNA. The district court granted the shipowner's motion for summary judgment. The court inappropriately engaged in "fact-finding" on reasonably disputable factual issues. The court of appeals reversed because those issues were material and could not be decided on motion for summary judgment (Appendix Petitioner's Brief, Par. IV, pp. B-18 - B-23).

Essential to the district court's decision were a number of "findings of fact" which resolved material questions of fact in favor of the shipowner when the evidence would have supported findings by a jury that were contrary to the district court's "findings." Thus, a jury could have found that the shipowner, in fact, knew that the winch was defective. There is uncontradicted evidence that the winch had been malfunctioning for two days prior to the date of the accident, and that during that time the repre-

sentatives of the shipowner were back and forth in the vicinity of the loading operations.

The district court "found" that the stevedore had exclusive control during the relevant time period, but there was a serious dispute as to exactly what control was within the power of the stevedore and what remained in the shipowner. The defective winch belonged to the shipowner as an integral part of the ship itself. Neither the plaintiff, Santos, nor any other longshoreman, had authority to take it upon themselves to repair the winch.

These examples, in addition to the others discussed in the decision of the court of appeals (Appendix Petitioner's Brief, Par. IV, pp. B-18 - B-23) are intimately connected with, and essential to, any decision that, as a matter of law, the defendant cannot be held responsible for the accident. It was not within the province of the district court to resolve those questions in the first instance. *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962).

ASSUMPTION OF THE RISK-COMPARATIVE NEGLIGENCE-CONCURRENT NEGLIGENCE

The essence of the district court's decision was that the injured longshoreman, Santos, could not recover against the shipowner, as a matter of law, because the danger was "open and obvious" to the plaintiff and the plaintiff recognized "that the circumstances were so dangerous." (Appendix A, Petitioner's Brief). The practical effect of the decision was to bar recovery because of assumption of risk. Thus, the district court committed clear error.

It is respectfully submitted that the decision of the court of appeals was absolutely correct in its adoption of a

standard of negligence which did not inject assumption of risk or contributory negligence bars against the plaintiff. Obviously, this is not new or different law. The appellate court was most troubled by the district court's application of *Restatement (Second) of Torts,* §343 and §343A to the extent that they incorporate assumption of risk and contributory negligence ingredients which are inconsistent both with the maritime law as it traditionally has existed and with the 1972 amendments to the Longshoremen's and Harborworkers' Compensation Act. The appellate court reversed the district court because its application of *Restatement (Second) of Torts,* §343 and §343A incorporated the substance of the defenses of contributory negligence and assumption of the risk. The appellate court was correct, it is respectfully submitted, for the following reasons:

(1) Any negligence of plaintiff is not an absolute bar to recovery under maritime law which accepts the concept of comparative negligence of plaintiff and defendant. *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 408-409, 98 L. Ed. 143, 74 S. Ct. 202 (1953); *Socony-Vacuum Oil Company v. Smith,* 305 U.S. 424, 83 L. Ed. 265, 59 S. Ct. 262 (1939); *The Max Morris,* 137 U.S. 1, 34 L. Ed. 586, 11 S. Ct. 29 (1890).

(2) Congress specifically intended and stated that the admiralty concepts of comparative negligence rather than the common law rule as to contributory negligence should apply and also specifically provided that the preclusion of the defense of assumption of the risk would continue after the amendments. House Report No. 92-1441, 92d Cong., 2d Sess.,

reprinted in, 3 *U.S. Code Congressional and Administrative News,* (1972) p. 4704; Senate Report No. 92-1125, 92d Cong., 2d Sess., p. 12:

> Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently at different ports depending on the law of the state in which the port may be located. The Committee intends the legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of federal law. In that connection, *the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply* in cases where the injured employee's own negligence may have contributed to causing the injury. *Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable.*

(Emphasis added.)

(3) A longshoreman's personal carelessness reduces but does not necessarily bar his recovery. The negligence of a fellow workman or the stevedore contractor cannot bar a longshoreman's recovery against a shipowner in a concurrent negligence situation. The negligence of the longshoreman's employer or fellow longshoremen will not preclude or diminish recovery through a theory of imputed contributory negligence. *Shellman v. U.S. Lines, Inc.,* 528 F.2d 675 (9th Cir. 1975), *cert. denied,* 425 U.S. 936, 48 L. Ed. 2d 177, 96 S. Ct. 1668 (1976), *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo,* 528 F.2d 669 (9th Cir. 1975), *cert. denied,* 425 U.S. 944, 48 L. Ed. 2d 188, 96 S. Ct. 1685 (1976); *Edmonds v. Compagnie Generale,* .... U.S. ...., 61 L. Ed. 2d 521, 99 S. Ct. 2753 (1979).

(4) The oil spill example set out in the Congressional Committee reports (House Report at 4705; Senate Report at 10-11; 3 *U.S. Code Congressional and Administrative News,* (1972) p. 4705), makes it clear that the failure of the shipowner to discover and remove oil from a ship's deck resulting in injury to a longshoreman who slips and falls, can constitute negligence if "the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances."

The example is quoted below:

> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a landbased person in providing a safe place to work. *Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.*
>
> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: (1) The vessel put the foreign substance on the deck or knew that it was there, and willfully or negligently failed to remove it, *or (2) The foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances.*

(Emphasis added.)

Thus, petitioner can hardly argue that "reasonable care by the vessel under the circumstances" is not a proper standard.

(5) This court's decision in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 3 L. Ed. 2d 550, 79 S. Ct. 406 (1959), rejected the status designations of invitee, licensee and trespasser and held that a vessel owner owes the duty of ordinary care to all persons lawfully aboard the vessel. The shipowner must exercise reasonable care under the circumstances of each case.

Petitioner states that the decision of the Ninth Circuit is inconsistent with decisions in the Second, Third, Fourth, Fifth and Seventh Circuits. It is submitted, that the decision of the Ninth Circuit is solidly based and well-reasoned and represents a clear statement of a rule many courts are developing. The case by case sifting of decisions through the lower courts has already eliminated some of the so-called conflicts referred to in the brief of petitioner. Thus, in the Second Circuit, the court in *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 1978 Am. Mar. Cas. 1920 (2d Cir. 1978), upheld a trial court's award in favor of the injured longshoreman even though the condition of the deck was "obviously dangerous."

In *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 1976 Am. Mar. Cas. 551 (2d Cir. 1976), the court cautioned concerning the application of contributory negligence and assumption of the risk and went on to reverse and remand for a new trial on the basis that the ship could reasonbly have anticipated that the injured longshoreman would not have been able to avoid the danger despite its obviousness.

In the Third Circuit, *Griffin v. Wheeling-Pittsburgh Steel Corp.* ..... F.2d ..... (3d Cir. decided August 24, 1979) followed the *Kermarec* case, *above*, and adopted a standard of

reasonable care under the circumstances. The court rejected assumption of risk and imputation of negligence as improper ingredients in a longshoreman's personal injury case.

The case of *Matthews v. Ernst Russ Steamship Co., and M/V Tilly Russ, etc.,* .... F.2d .... (7th Cir. decided August 20, 1979), held that control of the unloading operation by the stevedore company did not absolve the ship from negligence in furnishing an unsafe ladder, and the fact that the danger was open and obvious did not prevent the plaintiff from recovery as a matter of law. Thus, the Seventh Circuit has turned toward a reasonable care under the circumstances approach in favor of its earlier approach in *Clemons v. Mitsui O.S.K. Lines, Ltd., and Baba-Daiko Shosen, K.K.,* 596 F.2d 746 (7th Cir. 1979), wherein it barred recovery, as a matter of law, because it held the longshoreman to have assumed the risk and imputed the negligence of the employer to him.

In the Fifth Circuit, the acceptance of §343 and §343A of the Restatement are much tempered by the court's more recent statements. In *Gay v. Ocean Transport & Trading Ltd.,* 546 F.2d 1233 (5th Cir. 1977), the court cautioned that it would not allow assumption of risk defenses to enter into longshore personal injury cases under the guise of "open and obvious danger" obviating any duty on the part of the shipowner. This trend was followed in that circuit in *Wiles v. Delta Steamship Lines, Inc.,* 574 F.2d 1338, 1978 Am. Mar. Cas. 2427 (5th Cir. 1978), wherein the court reversed and remanded for consideration of the question of whether the shipowner had been negligent and, if so, whether the plaintiff himself was negligent in a comparative negligence sense. It is submitted that the trend

in the Fifth Circuit shows a turning away from assumption of risk principles and toward a reasonable care under the circumstances approach.

In the First Circuit, in the case of *Anderson v. Iceland Steamship Co.*, 585 F.2d 1142 (1st Cir. 1978), the court specifically refuses to adopt Restatement §343 and §343A because of their incorporation of the defenses of contributory negligence and assumption of the risk.

In the Fourth Circuit case of *Chavis v. Finnlines Ltd.*, 576 F.2d 1072 (4th Cir. 1978), the court approved a jury instruction which stated that the owner of the ship owed the longshoreman the duty to exercise ordinary care under the circumstances and must keep the premises reasonably safe for use by the longshoreman in every reasonable pursuit in the performance of his duties. The earlier *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757, 1976 Am. Mar. Cas. 2048 (4th Cir. 1976), held that plaintiff was barred from recovery by accepting an open, obvious, and known danger.

CONSIDERATIONS IN GRANTING THE WRIT

It could be argued that the apparent early conflicts caused by the adoption of §343 and §343A of the *Restatement (Second) of Torts* are being resolved by the courts on a case by case basis. It could be argued more persuasively that the Restatement sections are so inconsistent with this Court's decision in *Kermarec, supra,* with the admiralty rule rejecting contributory negligence and assumption of risk, and with the clear congressional mandate regarding the 1972 amendments, that the attempts to reconcile will

ultimately create more confusion. Without a clear statement from this honorable court, the result may well be the very process which this court rejected in *Kermarec,* at 3 L. Ed. 2d at 554:

> In an effort to do justice in an industrialized modern society, with its complex economic and individual relationships, modern common law courts have found it necessary to formulate increasingly subtle verbal refinements to create some classifications among traditional common law categories, and to delineate fine gradations in the standards of care which the land owner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all of the circumstances."

As pointed out above, the "increasingly subtle refinements" have already begun in the Second, Fourth, Fifth and Seventh Circuits. The subclassifications and exceptions are a denial of the basic incompatibility of the admiralty law with Restatement 343 and 343A to the extent that assumption of risk and contributory negligence permeate them. The Ninth Circuit pointed out that the *Kermarec* reasoning applies "just as fully today." Perhaps, a simple reaffirmation of the *Kermarec* rule, as followed in this case, would be in order.

Respectfully submitted,

JAMES A. GRUTZ
JACKSON, ULVESTAD,
GOODWIN & GRUTZ
Attorneys for Respondent,
Lauro De Los Santos

Supreme Court, U. S.
FILED
JAN 3 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-512

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

vs.

LAURO DE LOS SANTOS and SEATTLE STEVEDORE CO.,
Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

GRAYDON S. STARING
Two Embarcadero Center, 26th Floor
San Francisco, California 94111
Attorney for Petitioner

LEGROS, BUCHANAN, PAUL &
MADDEN
ROBERT H. MADDEN

LILLICK MCHOSE & CHARLES
EDWARD M. KEECH
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7852

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-512

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

vs.

LAURO DE LOS SANTOS and SEATTLE STEVEDORE CO.,
Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

The Response is a horse soon curried. (1) The Court of Appeals should have reviewed the grant of summary judgment under proper standards, and the significance of the conflict with other circuits cannot be hidden by labeling it an error in applying Rule 56, Fed.R.Civ.P. (2) The possible correctness of the judgment below is no reason to deny certiorari, given the conflict among circuits and the importance of the question presented. (3) The lines of decision in the Courts of Appeals are not converging, but are remaining separate. *See, e.g., Stockstill v. Gypsum Transportation,* 607 F.2d 1112 (5th Cir. 1979).

This case and its progeny in which petitions for certiorari are also pending, *Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438 (9th Cir. 1979), No. 79-538, and *Matthews v. Ernst Russ Steamship Co.*, 603 F.2d 676 (7th Cir. 1979), No. 79-624, present dramatic conflicts. *Santos* not only rejects prior authority; on similar facts it reaches a result contrary to *Harris v. H. Schuldt Reederei*, 596 F.2d 92 (4th Cir. 1979), No. 78-1851 in this Court. *Bachtel* not only rejects the prior authority regarding OSHA regulations; its result is irreconcilable with *Clemons v. Mitsui O.S.K. Lines, Ltd.*, 596 F.2d 746 (7th Cir. 1979), petition for certiorari filed *sub nom. McCulley v. Mitsui O.S.K. Lines, Ltd.*, No. 79-706. And *Matthews, Santos'* other offspring, turns upon an unwarranted application of *Edmonds v. Compagnie Generale Transatlantique*, ... U.S. ..... (June 27, 1979), to the standard of care issues and the rejection of *Edmonds'* requirement of substantiality of causation.

Santos is not merely a departure from precedent; it is the authority on which others have first relied before making other departures, and it is respectfully submitted that the petition for certiorari herein should, therefore, be granted.

Respectfully submitted,

GRAYDON S. STARING
Attorney for Petitioner

FILED
JUL 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-512

In the Supreme Court

OF THE

United States

OCTOBER TERM 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

vs.

LAURO DE LOS SANTOS AND SEATTLE STEVEDORE CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER

GRAYDON S. STARING
Two Embarcadero Center
Suite 2600
San Francisco, CA 94111
(415) 421-4600
Attorney for Petitioner

LEGROS, BUCHANAN, PAUL & MADDEN
ROBERT H. MADDEN

LILLICK McHOSE & CHARLES
EDWARD M. KEECH
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

QUESTION PRESENTED FOR REVIEW

The question presented is whether a shipowner's duty of care to longshoremen under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. section 905(b) requires it to supervise the work of an expert independent stevedore contractor so closely as to be in a position to countermand the stevedore contractor's informed decision regarding the safety of work methods and equipment.

TABLE OF CONTENTS

	Page
Opinions and judgments below	1
Jurisdiction	1
Statute involved	1
Statement of the case	2
Summary of argument	6
Argument	9
I. The decision below conflicts with general and land-based principles of tort law which Congress directed the courts to apply	9
A. Congress directed the courts to apply generally prevailing and land-based tort principles	9
B. The applicable tort rules are indicated in the legislative history and set forth in many cases both before and since the enactment of 33 U.S.C. Section 905(b)	11
C. The shipowner owes a duty to use due care when it has superior knowledge or control; otherwise it may rely on the stevedore company to work so as to avoid obvious hazards and choose safe methods	20
D. The standard adopted below conflicts with general land-based principles	21
II. The failure to apply land-based principles frustrates the important policies of the 1972 Amendments	22
A. The rule below does not promote safety	22
B. By encouraging frequent third-party lawsuits, the rule below subverts primary reliance on the compensation remedy	27
C. The rule below fails to take account of other rules restricting the fair distribution of loss	29

TABLE OF CONTENTS

Page

III. The result below is based upon faulty legal analysis 30
A. The court below erred by attempting to fashion new rules 30
B. The court misused the legislative history 31
C. The result below is not supported by rules of state law governing industrial accidents 32
D. The court below, in failing to focus its analysis upon the scope of the shipowner's duty, falsely perceived and analyzed problems concerning contributory negligence and assumption of risk 33
E. The court misunderstood and misapplied the holding of this Court in Kermarec v. Compagnie Generale Transatlantique 35
F. The rule of the court below is based on an unacceptable derogation from the principle that longshoremen and stevedore contractors must stop work when conditions are dangerous if the waterfront is to be made safer 38

IV. The ruling below has a substantial adverse impact upon shipowners' liabilities and the ability to dispose of unmeritorious cases 39
A. By eliminating traditional threshold requirements, the rule makes it impossible to dispose of clearly unmeritorious cases without full trial 39
B. The ruling below, augmented by misinterpretations of the Edmonds decision, has led to the imposition of even further burdens upon the shipowner 42

Table of Contents

	Page
V. The decision of the trial court was correct	45
A. The trial court correctly decided that the shipowner had not been negligent	45
B. The district court properly decided that any defect in the winch was not a proximate cause of the accident	47
C. The trial court was not guilty of making "findings" on material issues	48
Conclusion	50

TABLE OF AUTHORITIES CITED

Cases

Page

Afienko v. Harvard Club, 365 Mass. 320, 312 N.E.2d 196 (1974) 33

Albanese v. N/V Nederl. Amerik Stoomv. Maats., 382 U.S. 283 (1965) 12, 13, 22

Albanese v. N/V Nederl. Amerik Stoomv. Maats., 346 F.2d 481 (2d Cir.), *rev'd per curiam*, 382 U.S. 283 (1965) 12, 39, 48

Allen v. Cloutier Construction Corp., 44 N.Y.2d 290, 405 N.Y.S.2d 630, 376 N.E.2d 1276 (1978) 33

Anderson v. Iceland Steamship Co., 431 F. Supp. 869 (D. Mass. 1977), *rev'd*, 585 F.2d 1142 (1st Cir. 1978) 31, 41

Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978) 14, 19, 39

Anuszewski v. Dynamic Mariners Corp., 391 F. Supp. 1143 (D. Md. 1975), *aff'd*, 540 F.2d 757 (4th Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977) 18

Arney v. United States, 479 F.2d 653 (9th Cir. 1973) 41

Aro Manufacturing Co. v. Convertible Top Replacement Co., 377 U.S. 476 (1964) 14

Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979) 43

Bess v. Agromar Line, 518 F.2d 738 (4th Cir. 1975) 41

Bloomer v. Liberty Mutual Insurance Co., 48 U.S.L.W. 4211 (March 3, 1980) (No. 78-1418) 11, 26, 28

Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) 18, 40

Briley v. Charente Steamship Co., 572 F.2d 498 (5th Cir. 1978) 19, 40

Brock v. Coral Drilling, Inc., 477 F.2d 211 (5th Cir. 1973) 39

Table of Authorities Cited

Cases

Page

Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977) 41

Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977) 18, 40

Canizzo v. Farrell Lines, Inc., 579 F.2d 682 (2d Cir.) *cert. denied*, 439 U.S. 929 (1978) 18, 32

Castel v. Moller, A.P., 441 F. Supp. 851 (N.D. Cal. 1977) 14

Chavis v. Finnlines, Ltd., 576 F.2d 1072 (4th Cir. 1978) 11, 18

Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979) 18, 41

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) 30

Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798 (2d Cir.), *cert. denied*, 439 U.S. 881 (1978) 19, 41, 48

Davison v. Pacific Inland Navigation Co., 569 F.2d 507 (9th Cir. 1978) 47

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) 8, 11, 25, 26, 29, 43, 44

Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969) 8, 16, 17, 37

Gallardo v. Westfal-Larsen & Co., 435 F. Supp. 484 (N.D. Cal. 1977) 29

Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977) 18, 40, 45, 48

Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303 (9th Cir. 1970) 47

Giglio v. Farrell Lines, Inc., 613 F.2d 429 (2d Cir. 1980) 18

Griesel v. Dart Industries, Inc., 23 Cal.3d 578, 153 Cal. Rptr. 213, 591 P.2d 503 (1979) 33

Gross v. Southern Railway, 414 F.2d 292 (5th Cir. 1969) 41

TABLE OF AUTHORITIES CITED

CASES

Page

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952) 30

Hawkins v. United Overseas Export Lines, Inc., No. Y-79-1320 (D.Md., April 15, 1980) 30

Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978) 18, 41

Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449 (2d Cir. 1978) 18, 19, 41

Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (S.D. Cal. 1959), *aff'd sub nom.*, Metropolitan Stevedore Co. v. Dampskisaktieselskabet International, 274 F.2d 875 (9th Cir.), *cert. denied*, 363 U.S. 803 (1960) 15, 16, 17, 20, 21, 37, 47

Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977) 11, 19, 41

Ingraham v. Wright, 430 U.S. 651 (1977) 14

Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964) 15, 24

Johnson v. A/S Ivarans Rederi, 613 F.2d 334 (1st Cir. 1980) 43, 44

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) 8, 35, 36, 37

Laird v. Nelms, 406 U.S. 797 (1972) 14

Landon v. Lief Hoegh & Co., 521 F.2d 756 (2d Cir. 1975), *cert. denied*, A/S Arcadia v. Gulf Ins. Co., 423 U.S. 1053 (1976) 16

Lawson v. United States, 605 F.2d 448 (9th Cir. 1979) 43

Lopez v. A/S D/S Svendborg, 581 F.2d 319 (2d Cir. 1978) 18

Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364 (2d Cir. 1978) 18

Table of Authorities Cited

Cases

Page

Lubrano v. Royal Netherlands Steamship Co., No. 79-7228 (2d Cir. March 31, 1980) 18, 19

Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977) 24, 41

Matthews v. Ernst Russ Steamship Co., 603 F.2d 676 (7th Cir. 1979) 43, 44

Mattivi v. South African Marine Corp., 618 F.2d 163 (2d Cir. 1980) 18, 41

McCullough v. The S/S Coppename, 608 F.2d 208 (5th Cir. 1979) (opinion withdrawn by order of the court) 18, 40, 48

Mickle v. The Henriette Wilhelmine Schulte, 188 F. Supp. 77 (N.D. Cal. 1960) 17, 37

Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960) 31

Munoz v. Flota Merchante Grancolombiana, S.A., 553 F.2d 837 (2d Cir. 1977) 24, 41

Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976) 11, 18, 45

Owen v. City of Independence, 48 U.S.L.W. 4389 (April 16, 1980) (No. 78-1779) 14

Partenweederei, MS Belgrano v. Weigel, 299 F.2d 897 (9th Cir.), *cert. denied,* 371 U.S. 830 (1962) 46, 47

Pierson v. Ray, 386 U.S. 547 (1967) 14

Poirier v. Town of Plymouth, ... Mass. ....., Mass. Adv. Sh. (1978) 100, 372 N.E.2d 212 (1978) 33

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) 6, 26

Ramirez v. Toko Kaiun K.K., 385 F. Supp. 644 (N.D. Cal. 1974) 39

Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979) 19, 41

Riddle v. Exxon Transportation Co., 563 F.2d 1103 (4th Cir. 1977) 18, 35

Table of Authorities Cited

Cases

	Page
Roberts v. Andrew Martin Sea Services, Inc., No. 78-2219 (5th Cir. May 30, 1980)	19, 40
Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977)	18, 19, 41
Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884 (5th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979)	18
Slaughter v. S.S. Ronde, 390 F. Supp. 637 (S.D. Ga. 1974), *aff'd*, 509 F.2d 973 (5th Cir. 1975)	39
Stevens v. Colorado Fuel & Iron, 24 Utah 2d 214, 469 P.2d 3 (1970)	33
Stockstill v. Gypsum Transportation, 607 F.2d 1112 (5th Cir. 1979)	18, 41
Trotter v. Anderson, 417 F.2d 1191 (7th Cir. 1969)	41
United States v. Reliable Transfer Co., 421 U.S. 397 (1975)	30
Wescott v. Impresas Armadoras, S.A., 564 F.2d 875 (9th Cir. 1977)	19, 41
West v. United States, 361 U.S. 118 (1959)	17, 18, 37, 47
Weyerhaeuser Steamship Co. v. Nacirema Operating Co., 355 U.S. 563 (1958)	36
Whirlpool Corp. v. Marshall, 48 U.S.L.W. 4189 (February 26, 1980) (No. 78-1870)	8, 38
Wiles v. Delta Steamship Lines, Inc., 574 F.2d 1338 (5th Cir. 1978)	18
Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967)	14

(Cases which appear only in Appendices I and II are not tabulated.)

TABLE OF AUTHORITIES CITED

Statutes

	Page
28 U.S.C. section 1254(1)	1
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. sections 901 et seq.:	
Section 905(b)	1, 4, 6, 11, 29, 33
Section 908(i)	28
Section 916	28
Section 928	28
Section 933(f)	26, 28

Regulations

Safety and Health Regulations for Longshoring, 29 C.F.R. Part 1918:	20, 26
Section 1918.2	20
Section 1918.3(d)	20
Section 1918.53(a)(5)	45

Miscellaneous

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698	9, 10, 11, 13, 23, 27, 28, 31, 32
A. Larson, The Law of Workmen's Compensation (1978)	32, 33
W. Prosser, Law of Torts (4th ed. 1971)	34, 47
Restatement (Second) of Torts (1965):	
Section 284	21, 34
Section 314	34
Section 315	21, 34
Section 343	9, 14, 15, 16, 18, 21, 32, 34, 45
Section 343A	9, 14, 15, 16, 18, 21, 32, 34, 45
Section 388	14, 15, 21
Section 409	14, 15, 16, 18, 32
Section 410	14, 15, 18, 21
Section 411	14, 15, 18

TABLE OF AUTHORITIES CITED

MISCELLANEOUS

Page

Section 414 ..... 14, 18, 21
Section 414A 14, 18, 21
Section 415 18

S. Rep. 92-1125, 92d Cong., 2d Sess. 9, 10, 11, 13, 23, 27, 28, 31, 32

U.S. Bureau of The Census, Statistical Abstract of the United States (1979) Table No. 101 25

No. 79-512

In the Supreme Court

OF THE

United States

OCTOBER TERM 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

VS.

LAURO DE LOS SANTOS AND SEATTLE STEVEDORE CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF PETITIONER

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States District Court for the Western District of Washington is not officially reported but is reported at 1976 A.M.C. 2583 and is set forth in Appendix A to the Petition for Certiorari. The district court's judgment is set forth in the Joint Appendix at p. 24. The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported at 598 F.2d 480 and is set forth in Appendix B to the Petition for Certiorari. The judgment of the Court of Appeals is set forth in the Joint Appendix at p. 25. The order of the Court of Appeals denying the petition for rehearing is not reported but is set forth in Appendix C to the Petition for Certiorari.

JURISDICTION

On May 1, 1979, the Court of Appeals entered its judgment reversing the decision of the district court granting the petitioner's summary judgment motion. A petition for rehearing was timely filed May 15, 1979, and was denied June 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). This Court granted certiorari May 12, 1980.

STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. section 905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was

caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

On December 10, 1972 (A. 10),[1] just two weeks after the effective date of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972,[2] Seattle Stevedore Company was engaged as an independent contractor loading a cargo of bagged wheat aboard the M/S JALARATNA, owned by Petitioner, Scindia Steam Navigation Co., Ltd. (A. 10-11). One of Seattle Stevedore Company's employees was plaintiff and Respondent Lauro De Los Santos (A. 11). Santos and other employees had been loading the wheat from 7:00 p.m. to 8:45 p.m. that evening (A. 11). It must be taken as true on defendant's summary judgment motion that Seattle Stevedore Company had also been loading the cargo for two days before (Plaintiff's Memorandum of Authorities, p. 2, R. 119). It is stipulated that as an independent contractor, Seattle Stevedore Company was in control of the loading operations (A. 11).

Shortly before Santos was injured, a pallet load of sacks of wheat being brought into the ship by a winch

---

[1]"A." refers to the Joint Appendix; "Pet. App." means an appendix to the Petition for Certiorari; "Appendices I, II and III" refer to the compilations of state cases and Restatement sections following this brief; and "R." refers to the clerk's Transcript in the Court of Appeals in which the pages are consecutively numbered.

[2]Pub. L. No. 92-576, 86 Stat. 1251 (1972).

operated by another employee of the same stevedore company landed badly and some of the sacks of wheat spilled on the deck where Santos was working (A. 11). The hatch tender who was supervising the operation directed the winch driver to raise the pallet load containing the remaining disarranged sacks about fifteen feet up, while Santos and another longshoreman went under it to clean up the spilled sacks (A. 11). About ten minutes later when more sacks fell from the suspended load, some of them hit Santos, injuring him (A. 11).

Santos filed suit in the United States District Court for the Western District of Washington (A. 1, 3). After entry of the pretrial order, Scindia moved for summary judgment (A. 1), since plaintiff had not asserted in the pretrial order that the shipowner played any part in operating the winch, raising the load, leaving it suspended over the hold, or causing the plaintiff to work under it (A. 14-15). In reply plaintiff did not allege that Scindia had played any active role in the accident, and merely pointed to deposition testimony which showed that the stevedore company's winch operator claimed to have encountered difficulty controlling the winch for two days prior to the accident. The brake which controlled the descent of the load of cargo was said to have failed to stop the load immediately when the mechanism was put in the stop position and to have permitted the load to creep down after it was suspended over the work area.[3] This difficulty was claimed to be the cause of both the spillage of the sacks in the first place and the later falling of the sacks on Santos (Plaintiff's Memorandum of Authorities, pp. 1-2, R. 118-19).

---

[3]Scindia does not concede that the electric winch malfunctioned as described. Indeed it does not admit credence to such a view, because of the inherent implausibility that a brake malfunction on such a winch would produce the behavior described. But the plaintiff's allegations, although implausible, must be assumed to be true here.

Plaintiff argued that, if the jury believed this testimony, the shipowner ought to be chargeable with knowledge of the problem with the winch in time to have corrected it (*Id.* at 9-10, R. 126-27). The trial court rejected this contention and granted summary judgment, basing its decision on the obviousness of the condition, the control exercised by the stevedore company and the extreme danger inherent in the decision to work under the suspended but unsteady load. Pet. App., pp. A-4 to A-6.

The Court of Appeals reversed, announcing a standard that imposed a duty on the shipowner to supervise the stevedore company and to protect longshoremen notwithstanding the obviousness of the condition and the stevedore's control.

> We adopt the following standard of negligence for purposes of 33 U.S.C. § 905(b) actions:
>
> A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner
>
> (a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such longshoremen, and
>
> (b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger. [Pet. App., p. B-11, 598 F.2d at 485.]

The Court of Appeals also charged the trial court with four specifications of resolving factual issues on a summary judgment motion:

1. The trial court had noted the failure of plaintiff to contend that the shipowner had actual knowledge and then added the holding that the shipowner could not be charged with constructive knowledge since the shipowner

did not have a duty to know, in light of the stevedore's stipulated control. Pet. App., pp. A-4, A-5. This parenthetical notation that the shipowner had neither actual nor constructive knowledge of the defect in the winch was said by the Court of Appeals to be a finding. Pet. App., pp. B-18, B-19, 598 F.2d at 489.

2. The Court of Appeals decided that the trial court had erred in describing the stevedore company's control, which was admitted in the pretrial order, as "exclusive control of the gear and the premises", since only the shipowner had the power to repair the winch. Pet. App., pp. B-20 to B-22, 598 F.2d at 490. The trial court, however, was referring to the operation of the winch and had never reached the question whether the shipowner had a duty to repair the winch, since it determined that it had no duty to learn of the condition.

3. The trial court had accepted Santos' view at the outset of its discussion when it recited that he alleged the winch was defective when it "was lowering pallets loaded with sacks of bulgar wheat" and "this defective winch proximately caused the plaintiff's injuries." Pet. App., p. A-3. The Court of Appeals, however, stated that the trial court had erred in saying that the first spillage of sacks had been "caused by the pallet striking the pallet jack" and in failing to take account of Santos' "broader view that the defective braking mechanism caused the initial spillage". Pet. App., p. B-22, 598 F.2d at 490.

4. The Court of Appeals charged the trial court with "emphasizing" that the pallet was swinging and ignoring Santos' claim that it was the creeping of the winch as a result of the slipping brake which caused the sacks to fall on him. The trial court opinion does not disclose the origin of this view, as it shows no sign of doubting that plaintiff might prove that a defect in the winch caused his injury.

SUMMARY OF ARGUMENT

I. Generally applicable principles of land-based negligence law determine the scope of a shipowner's duty to longshoremen under the 1972 Amendments to the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), which abolished the longshoremen's cause of action for unseaworthiness and retained a cause of action for negligence, since Congress directed the courts to apply such principles and the prior decisions of this Court declare them to be controlling. Those principles are expressed in a case Congress referred to in the legislative history, in the law of most states, in the Restatement (Second) of Torts, and in Supreme Court cases before 1972. They establish that a shipowner is not required to supervise an independent expert stevedore contractor; that the shipowner's duty extends to warning of concealed dangers which are not known nor obvious to the stevedore contractor, but which are known or should be known in the exercise of reasonable care to the shipowner; that the shipowner's own actions and any exercise of control over the details of the stevedore's activities must be reasonable under the circumstances; and that the shipowner must take reasonable care of areas or equipment over which it retains control. The result below is based on entirely different principles which require the shipowner to supervise the stevedore contractor and which impose liability for injuries caused by obvious conditions known to the stevedore company.

II. The rule below frustrates three important policies of the act. First, it does not promote safety, for if the prior decision of this Court in *Pope & Talbot v. Hawn*, 346 U.S. 406, permitting a negligent stevedore to recover its lien, is still law, the third-party action relieves the stevedore of expense for the accident. The rule below allows such reimbursement even when the stevedore was in a better position to have avoided the accident than the shipowner. Re-

moving the burden from the party in the better position to avoid accidents causes a reduction in the safety incentive which probably more than offsets any increase in that incentive because of the third-party action, especially since any increase in the total incentive resulting from the tort action is doubtful. Second, the rule below is inimical to the principles of security and reasonable attorneys' fees. The third-party action has no demonstrable effect other than to produce an immediate lump sum award of future compensation, less an unregulated fee, instead of the permanent monthly payments and controlled fees the statute provides. Third, the result below permits courts and juries to impose liability for minimal, passive fault, when such imposition is unfair because the statute and case law prohibit contribution and indemnity and the collateral source rule may bar proof of plaintiff's receipt of compensation and of his employer's stake in the judgment.

III. A-C. The decision below was based on erroneous legal analysis. The court saw its job as fashioning a new standard, while actually Congress directed courts to apply existing rules. The court below rejected a score of court of appeals decisions and relied instead on an already reversed district court decision and the grease spot illustration from the legislative history, which explains the unseaworthiness remedy Congress abolished, but does not provide any insight into the rules for negligence actions. The court failed to consider the absence of support for the rules it applied in the great body of state law.

III. D-E. The decision below confuses the elements of a tort action and merges "duty" into "standard of care" to produce "standard of negligence". Such an approach ignores the general rule that one must have a duty to act before one can be said to have carelessly failed to act and thus fails to recognize the need for rules about duty. By overlooking the role of "duty" in negligence analysis, the court also confused assumption of risk and contributory negligence (not defenses under the statute) with duty. The

court misunderstood the holding of *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, to be inconsistent with rules about duty, but *Kermarec* was decided at a time when this Court understood and applied those rules and this Court has since cited *Kermarec* and the very rules rejected below in the same breath in *Federal Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404.

III. F. The decision below is based on a view that longshoremen face trouble for stopping work in the face of dangerous conditions, a view discredited by the recent decision of this Court in *Whirlpool Corp. v. Marshall,* 48 U.S.L.W. 4189 (February 26, 1980) (No. 78-1870). The court below also ignored the stevedore company's well established power and duty to stop work and compel correction of dangerous conditions at the expense of the shipowner.

IV. The standard below, because it submerges the crucial considerations of obviousness and control by the stevedore into a general inquiry into all the circumstances, will require disposition by trial of vast numbers of cases brought instead of relying on the compensation remedy, where the shipowner's involvement has been only to fail to prevent the stevedore contractor from doing what it knowingly chose to do to deal with known dangers. The decision below has been seized upon by courts and augmented by misreadings of the decision in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 to produce heretofore unthinkable results, including: declarations that the stevedore company's fault and control are irrelevant; application of the OSHA regulations as evidence of negligence of the shipowner (who is not the "employer" against whom alone the regulations apply); and finally re-elevation of the longshoreman to the status of merchant seaman as a beneficiary of the special Jones Act causation rule and the person in whose favor all doubts must be resolved.

V. While the Court of Appeals' decision was incorrect, the trial court's grant of summary judgment was not. The district court relied on sections 343 and 343A of the Restatement (Second) of Torts and on the fact that it was inconceivable that a stevedore company would permit its employees to work under a disarranged load of sacks suspended from a winch known, or thought, to be slipping, and found that the shipowner was not negligent and any problem with the winch was not a proximate cause of the injury. This decision was correct under the principles the court applied, under those the Petitioner urges here, and under a remarkably similar 1962 Ninth Circuit decision. The trial court did not resolve material issues of fact; it assumed facts as plaintiff would have them and held that the inferences plaintiff urged were immaterial.

ARGUMENT

I

THE DECISION BELOW CONFLICTS WITH GENERAL AND LAND-BASED PRINCIPLES OF TORT LAW WHICH CONGRESS DIRECTED THE COURTS TO APPLY

A. Congress Directed the Courts to Apply Generally Prevailing and Land-Based Tort Principles

When Congress enacted the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, abolishing longshoremen's unseaworthiness claims and prescribing only a cause of action for negligence, Congress directed the courts to apply accepted and land-based principles of negligence law.

> [D]isputes as to whether the vessel was negligent in a particular case . . . can only be resolved through the application of accepted principles of tort law . . . .[4]

---

[4]S. Rep. No. 92-1125, 92d Cong., 2d Sess. 11 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4704 [hereinafter cited as S. Rep. 92-1125; H.R. Rep. 92-1441].

Congress understood the law governing the rights of employees of independent contractors ashore and constructed the 1972 Amendments in light of that law. Both the Senate and House of Representatives committee reports state that a longshoreman suing a vessel is to be in a position neither better nor worse than an injured worker on land under analogous circumstances.

> The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.[5]

This Court has recognized the necessity of referring to the proper rules of tort law applicable to the issue at hand when interpreting the 1972 Amendments to avoid throwing out of balance a structure carefully constructed by Congress. In dealing with an issue which Congress had left to the maritime rules and not referred to land-based law, the Court said:

> [W]e are mindful that here we deal with an interface of statutory and judge-made law. In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change. "One of the most controversial and difficult issues which [Congress was] required to resolve . . . concern[ed] the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations." S Rep. 8. By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases

---

[5] *Id.*

> advise, we should stay our hand in these circumstances.[6]

The general rules applicable to the issue now before the Court are those prevailing in land law; peculiar principles of maritime law are inapplicable.

> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.[7]

The legislative history thus directs courts to reject traditionally "expansive maritime tort liability" and embrace narrower and land-based rules.[8]

B. The Applicable Tort Rules Are Indicated in the Legislative History and Set Forth in Many Cases Both Before and Since the Enactment of 33 U.S.C. Section 905(b)

There is a consistent body of accepted principles of tort law concerning the duties and liabilities of parties in positions analogous to those of shipowners who turn their

---

[6]Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 271-73 (1979) (footnotes and citations omitted); Bloomer v. Liberty Mutual Insurance Co., 48 U.S.L.W. 4211 (March 3, 1980) (No. 78-1418).

[7]S. Rep. 92-1125 at 10; H.R. Rep. 92-1441 at 4703.

[8]*See* Chavis v. Finnlines Ltd., 576 F.2d 1072, 1078 (4th Cir. 1978); Hurst v. Triad Shipping Co., 554 F.2d 1237, 1247 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 507 (2d Cir. 1976).

vessels over to independent stevedoring contractors. It is this body of law to which Congress referred and which it had in mind when it enacted the 1972 Amendments.

As we have shown, Congress intended the courts to apply generally prevailing land-based tort principles to longshoremen's negligence claims, but the legislative history goes farther and shows by specific example that the negligence action permitted was not intended to encompass a duty to supervise a qualified stevedore contractor.

In *Albanese v. N/V Nederl. Amerik Stoomv. Maats.*,[9] the trial court had permitted the jury to find negligence even in the absence of a showing that the shipowner had actual knowledge of an unsafe condition in the hold, if the jury determined that the condition had existed long enough to charge the shipowner with notice of it. The Court of Appeals said:

> This was erroneous, for when a shipowner hires a qualified stevedore to load the vessel the standard of due care does not require that he actively supervise the stevedore's work or that he take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist. . . . [T]o lay down a contrary rule . . . would be to confuse the concept of unseaworthiness with that of negligence.[10]

This Court dealt with the subject *per curiam* as follows:

> We believe that the judgment of the Court of Appeals setting aside the judgment for petitioner Albanese on the ground that the trial court incorrectly charged the jury on the issue of negligence is erroneous. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206.[11]

---

[9]346 F.2d 481 (2d Cir.), *rev'd per curiam*, 382 U.S. 283 (1965).

[10]346 F.2d at 483.

[11]Albanese v. N/V Nederl. Amerik Stoomv. Maats., 382 U.S. 283 (1965).

The committee reports cite the *Albanese* case among a number of prior decisions of this Court which they disavowed for the future:

> Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act . . . *Albanese v. Maats,* 382 U.S. 283. . . .[12]

Thus the committees indicated that shipowners were to be freed from liability for the actions of stevedore contractors and that such liability was not to be reimposed by means of a duty to supervise.

Decisions in a great majority of the states establish the two principal general rules which underlie most of the decisions of the courts of appeals in favor of shipowners upon which we rely here. The first of these rules of land-based negligence law is that the owner of premises upon which he has engaged an independent contractor to work has a duty to use reasonable care to make the premises reasonably safe for the use of the independent contractor and to warn the contractor of dangers of which he knows and the contractor does not.[13] The second general rule is that the owner or occupier of premises who retains no more right of control over the independent contractor's work than that necessary to secure satisfactory completion of the work owes no duty to protect the contractor or its employees from dangerous conditions arising during the performance of the work.[14]

The American Law Institute, whose general formulations in the restatements of the law are synthesized from our

---

[12]S. Rep. 92-1125 at 10; H.R. Rep. 92-1441 at 4703.

[13]Cases illustrative of the application of this rule in the great majority of the states which have had occasion to apply it are listed in Appendix I hereto.

[14]Cases illustrative of the application of this rule in the great majority of the states which have had occasion to apply it are listed in Appendix II hereto.

nationwide jurisprudence,[15] has expressed the first of the general rules stated above in sections 343 and 343A of the Restatement (Second) of Torts, and the second in sections 409-414. These Restatement sections, rather than the vast underlying bodies of jurisprudence, have been cited by the courts of appeals in most of the numerous cases with which the court below is avowedly at odds.[16] (The Restatement sections are set forth in Appendix III.)

Other sections of the Restatement have been cited, although less often, and are highly relevant to the general problem. Section 388, concerning responsibility of the supplier of a chattel for use by another, has been cited in denying liability where a stevedore used a patently defective ladder belonging to the vessel.[17] And section 414A, rather than section 343, has been relied on where the injury occurred on the pier and thus off the shipowner's premises rather than on them.[18] These sections provide a range of land-based duty standards applicable according to the varying circumstances, such as an injury on the pier caused by activities on the vessel (§ 414A), the activities of the steve-

---

[15]This Court has frequently referred to the Restatement of Torts as the source of generally applicable tort principles. Ingraham v. Wright, 430 U.S. 651, 661 (1977) ("prevalent rule"); Laird v. Nelms, 406 U.S. 797, 800 (1972) ("presently prevailing view"); Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202 (1967) ("general rule of the law of torts"); Pierson v. Ray, 386 U.S. 547, 555 (1967) ("prevailing view in this country"); Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 501 (1964) ("scholarly authority"); *see also* Owen v. City of Independence, 48 U.S.L.W. 4389, 4405-6 (April 16, 1980) (No. 78-1779) (Powell, J., dissenting) ("leading commentator").

[16]These cases are analyzed in this brief at pp. 18-19, *infra*.

[17]Castel v. Moller, A.P., 441 F.Supp. 851 (N.D. Cal. 1977).

[18]Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978).

dore contractor on board (§§ 409-411), the condition of tools, rigging, machinery and other appurtenances furnished (§ 388), or the condition of the premises themselves, that is to say, the decks, walkways and other structures (§§ 343 and 343A).

Since Congress did not intend to impose after 1972 a heavier burden of care and concern than before, another possible source of the duty standard is the pre-1972 jurisprudence on the subject of the shipowner's duty to protect longshoremen, apart from the warranty of seaworthiness (which was abolished in 1972). In *Hugev v. Dampskisaktieselskabet International,*[19] the district court, in a remarkable opinion adopted by the Court of Appeals, displayed a practical view of the problems of a vessel's condition upon arriving in port and of the reliance of the shipowner upon the expertise of a stevedore contractor[20] and laid out the duty of the shipowner for the protection of the stevedore's employees as follows:

> (1) to exercise ordinary care under the circumstances to place the ship on which the stevedoring work is to be done, and the equipment and appliances aboard ship, in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care under the circumstances to load or discharge the cargo, as the case may be, in a workmanlike manner and with reasonable safety to

---

[19]170 F.Supp. 601 (S.D. Cal. 1959), *aff'd sub nom.*, Metropolitan Stevedore Co. v. Dampskisaktieselskabet International, 274 F.2d 875 (9th Cir.) (adopting district court opinion), *cert. denied,* 363 U.S. 803 (1960).

[20]On these points the case was cited with approval in Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 323 (1964).

> persons and property; and (2) to give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedoring company in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring contract.[21]

The standard recognized by the court in *Hugev* and ignored or abandoned without comment in the decision below, while it may not cover all situations, probably covers most and clearly expresses the overwhelmingly prevalent land-based tort rules with respect to premises and independent contractors discussed above and articulated in Restatement sections 343, 343A and 409, *et seq.*

The *Hugev* standard quoted above was set forth in full in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*[22] as an indication of the shipowner's duty to oversee the safety of longshoremen. This Court said of it:

> While the court identified these obligations as implied in fact from the stevedoring contract, it indicated that they also constituted "the duty of ordinary care im-

---

[21]170 F. Supp. at 610-611.

[22]394 U.S. 404, 416-17 n.18 (1969). It has been debated whether the holding in this case has survived the 1972 Amendments to the Act. *See, e.g.*, Landon v. Lief Hoegh & Co., 521 F.2d 756, 761 (2d Cir. 1975), *cert. denied sub nom.*, A/S Arcadia v. Gulf Ins. Co., 423 U.S. 1053 (1976). However that might turn out if the issue were presented in a proper case (and there is no occasion to present it here), expressions in the *Federal Marine Terminals* case concerning the law as it existed in 1969, including the shipowner's duty of supervision, would be unaffected.

posed by law toward 'persons rightfully transacting business on ships.' "[23]

The Court went on to note another case similar to *Hugev* as follows:

> In the case of *Mickle v. The Henrietta Wilhelmine Schulte*, 188 F. Supp. 77, 80, the District Court for the Northern District of California, while rejecting the argument that such obligations were contractual, agreed that the occupier of a ship "owes certain duties of care to a business invitee, especially to an independent contractor, such as a stevedore company, which comes onto the premises to perform services, 2 Harper & James, The Law of Torts, Section 27.12 (1956), including the duty not to cause injury by negligent activity, 2 Restatement of Torts, Section 341; the duty to warn of latent perils actually known to the occupier, Prosser on Torts, 453 (1955); and the duty to inspect the premises to discover dangerous conditions. 2 Restatement of Torts, Section 343. See generally, Prosser, supra, 452-62."[24]

Prior to 1972, this Court also faced the question of the shipowner's duties in a case where the ship had been withdrawn from navigation for repair so that there was no warranty of seaworthiness. The duty was defined in *West v. United States*[25] in full consonance with the Restatement, *Hugev* and *Mickle*.

> But here the owner had no control of the ship; it had been turned over to a repair contractor for extensive overhaul, which was not performed under the direction of the shipowner. While there might be instances of hidden or inherent defects, sometimes called "latent," that would make the owner guilty of negligence, even though he had no control of the re-

---

[23]394 U.S. at 417 n.18.

[24]*Id.*

[25]361 U.S. 118, 124 (1959).

> pairs, we hold that under the circumstances here the shipowner could not be so chargeable.[26]

In ruling on this question after the effective date of the 1972 Amendments, the majority of the courts of appeals have adopted one or another of the preceding approaches in order to limit the shipowner's duty to oversee the stevedore's operations. In a number of decisions they applied Restatement sections 343 and 343A;[27] a second group of decisions relied upon the application of Restatement sections 409 to 415, dealing with the duty to supervise one's

---

[26]*Id. West* has been applied since the 1972 Amendments in Riddle v. Exxon Transp. Co., 563 F.2d 1103, 1115 (4th Cir. 1977).

[27]Lubrano v. Royal Netherlands S.S. Co., No. 79-7228 (2d Cir. March 31, 1980); Giglio v. Farrell Lines, Inc., 613 F.2d 429 (2d Cir. 1980); Mattivi v. South African Marine Corp., 618 F.2d 163 (2d Cir. 1980); Lopez v. A/S D/S, Svendborg, 581 F.2d 319, (2d Cir. 1978); Canizzo v. Farrell Lines, Inc., 579 F.2d 682 (2d Cir.) *cert. denied,* 439 U.S. 929 (1978); Lubrano v. Royal Netherlands S.S. Co., 572 F.2d 364 (2d Cir. 1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449 (2d Cir. 1978); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976); Chavis v. Finnlines, Ltd., 576 F.2d 1072 (4th Cir. 1978); Riddle v. Exxon Transp. Co., 563 F.2d 1103 (4th Cir. 1977); Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757 (4th Cir. 1976), *cert. denied,* 429 U.S. 1098 (1977); Stockstill v. Gypsum Transp., 607 F.2d 1112 (5th Cir. 1979); McCullough v. The S/S Coppename, 608 F.2d 208 (5th Cir. 1979) (opinion withdrawn by order of the court); Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884 (5th Cir. 1978), *cert. denied,* 443 U.S. 915 (1979); Wiles v. Delta S.S. Lines, Inc., 574 F.2d 1338 (5th Cir. 1978); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Hess v. Upper Miss. Towing Corp., 559 F.2d 1030 (5th Cir. 1977), *cert. denied,* 435 U.S. 924 (1978); Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1997), *cert. denied,* 435 U.S. 934 (1978); Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979).

independent contractors;[28] and a third group limited the vessel owner's exposure by refusing to impose a duty to supervise the stevedoring operation where the shipowner had relinquished full control to the stevedore.[29] Although these approaches are not identical, similar results will be reached in most cases under any one of them because each recognizes the need to place reasonable limitations upon the shipowner's duty to inspect or supervise the stevedore's work for the protection of the stevedore's own employees. In limiting the vessel owner's duty to the longshoremen, these rules are uniformly at odds with the rule confected by the court below.

---

[28]Anderson v. Iceland S.S. Co., 585 F.2d 1142 (1st Cir. 1978); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977); Rich v. U.S. Lines, Inc., 596 F.2d 541 (3d Cir. 1979); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), *cert. denied,* 434 U.S. 861 (1977).

[29]Lubrano v. Royal Netherlands Steamship Co., No. 79-7228 (2d Cir. March 31, 1980); Cox v. Flota Mercante Grancolombiana, S.A. 577 F.2d 798 (2d Cir.), *cert. denied,* 439 U.S. 881 (1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 510 F.2d 449 (2d Cir. 1978); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), *cert. denied,* 434 U.S. 861 (1977); Roberts v. Andrew Martin Sea Services, Inc., No. 78-2219 (5th Cir. May 30, 1980); Briley v. Charente S.S. Co., 572 F.2d 498 (5th Cir. 1978); Westcott v. Impresas Armadoras, S.A., 564 F.2d 875 (9th Cir. 1977).

C. The Shipowner Owes a Duty to Use Due Care When It Has Superior Knowledge or Control; Otherwise It May Rely on the Stevedore Company to Work so as to Avoid Obvious Hazards and Choose Safe Methods

Considering the policy expressed in the OSHA regulations directed exclusively to stevedore employers,[30] the judicial and congressional recognition that the primary burden of safety should be placed upon the stevedore as best able to deal with it,[31] and the congressional policy that the emphasis be returned to compensation payments, leaving third-party suits for exceptional cases,[32] there is much to be said, following 1972, for a rule precluding recovery from the shipowner whenever the injury has resulted from a stevedore company's breach of its obligation of workmanlike service, including, of course, any breach of the OSHA regulations. There is a substantial body of industry opinion that this should be the rule. Or the Court could well choose to state the rule as it was stated in the *Hugev* case.

Based, however, upon the history and doctrinal development both before and after 1972, the following general rule may be stated, which will be found to be consistent with the intent of Congress, the pre-1972 negligence law in this field, the overwhelming weight of dry-land authority and the great majority of post-1972 appellate decisions:

> The vessel has a duty for the protection of longshoremen employed on or about her, to exercise reasonable care in the circumstances:
>
> 1. to deliver the areas of the ship and her equipment to be used by the stevedore in such condition that an expert and experienced stevedore contractor will be able to eliminate or avoid dangers encountered

---

[30]The Safety and Health Regulations for Longshoring, 29 C.F.R. Part 1918 impose responsibilities only on employers of longshoremen. See 29 C.F.R. §§ 1918.2 and 1918.3(d).

[31]See Section II.A., *infra*.

[32]See Section II.B., *infra*.

in the course of its work and to perform its work with reasonable safety by the exercise of reasonable care;[33]

2. to warn the stevedore contractor of any danger of the ship or her equipment which is not known or obvious to the stevedore contractor and which is known or in the exercise of reasonable care should be known to the vessel, and is not reasonably to be expected by an expert and experienced stevedore contractor, but is likely to be encountered in its work;[34] and

3. to avoid causing injury by the vessel's own activities, by her active control of the stevedore contractor's activities, or from dangerous conditions which the longshoremen should reasonably be expected to encounter in areas or equipment over which the vessel has retained active control.[35]

D. The Standard Adopted Below Conflicts With General Land-Based Principles

The standard adopted below conflicts in two major respects with the established rules Congress intended the courts to apply.

First, it requires the shipowner to supervise operations conducted by the stevedore company to determine whether

---

[33] *Cf. generally* Hugev v. Dampskisaktieselskabet International, 170 F.Supp. 601 (S.D. Cal. 1959), *aff'd sub nom.*, Metropolitan Stevedore Co. v. Dampskisaktieselskabet International, 274 F.2d 875 (9th Cir.), *cert. denied*, 363 U.S. 803 (1960). The criterion of expertise and experience is rooted also in Restatement sections 343 (b), 388(b), 414, 414A.

[34] *Cf. generally Hugev.* The requirement of warning is rooted in Restatement sections 343 and 388. The distinction of known or obvious conditions is rooted in Restatement sections 343(b), 343A (1) and 388(b), and that of conditions reasonably to be expected by the contractor in sections 343(b) and 388(b).

[35] This is rooted in Restatement sections 284 and 315 as to the vessel's activities, section 410 as to control of contractor activities and section 343 as to conditions in areas controlled by the vessel.

they are safe. Such a rule embodies the very duty of supervision which Congress thought it had eliminated when it disapproved the *Albanese* result.

Second, any liability which might be imposed on Scindia in this case would be the result of a condition which was both known and obvious, and apparently not objectionable, to the stevedore company.

To reach such a result the court below rejected the authority of twenty or more current cases in its own circuit and others. The result, moreover, disserves the policies Congress sought to promote and is based upon erroneous analysis of the legal issues, as the next two sections of this brief will show.

II

THE FAILURE TO APPLY LAND-BASED PRINCIPLES FRUSTRATES THE IMPORTANT POLICIES OF THE 1972 AMENDMENTS

A. The Rule Below Does Not Promote Safety

Making the waterfront safer was a fundamental concern of Congress in 1972, so fundamental that its achievement was not left to be solely dependent upon results of third-party actions. Instead, Congress enacted a vast increase in compensation benefits to supplement the existing scheme of safety and health regulations, providing the basis for a safe waterfront.

> This consideration [safety] is particularly crucial with respect to high-risk occupations such as those covered by this Act. Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry, and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a work-

> men's compensation system which maximizes industry's motivation to bring about such an improvement.[36]

By raising the level of workers' compensation benefits, Congress ensured that the cost of each accident would be imposed upon the longshoring and shipping industry. This imposition of the costs of accidents had previously been provided, only somewhat crudely and unfairly, by the shipowner's no-fault liability for unseaworthiness, which Congress now felt free to abolish.

> [G]iven the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness.[37]

Against the background of the regulatory and economic means provided to compel safety, the courts must now attempt to make third-party liability actions also promote safety. The court below failed to undertake this attempt; the opinion contains a ritualistic mention of safety but no analysis of whether its rule more effectively promotes safety than the Restatement rules it rejects.

The issues involved in such an analysis are easily identifiable: do third-party lawsuits cause the cost of accidents to be placed on the correct party and do they increase the costs in a manner which provides an additional incentive to make conditions safe? Analysis of these issues discloses that the rule announced below will often cause the costs of accidents to be imposed on the wrong party without increasing the total costs, and that the rule below therefore makes the waterfront less safe.

---

[36]S. Rep. 92-1125 at 2.

[37]S. Rep. 92-1125 at 10; H.R. Rep. 92-1441 at 4703.

This Court has imposed the cost of waterfront accidents on the party who "was in a far better position . . . to avoid the accident",[38] and courts of appeals have recognized that they must interpret the 1972 Amendments to continue to impose the costs in the same way.[39] When the cost burden is imposed on parties in the better position to avoid accidents, it more efficiently and economically avoids accidents, since the effectiveness of the burden is a function of its size in relation to the cost of doing so. If the cost of avoidance is higher than the costs of the accident, then safety is jeopardized. If the cost of avoidance is lower, the safety is enhanced.

The contractor doing the work can generally avoid the accident at less cost even when the equipment in use is the shipowner's, and this case illustrates the point. Directing the work so that Santos did not work under the suspended load would have avoided the injury. Realistically only the stevedore company could have prevented Santos from doing so; it all happened in about ten minutes, and there is no reason to believe that the shipowner knew or could have learned of the method in use without redundant and expensive supervision of this and every other move made by the stevedore company. And, while it is true that only the shipowner could repair the winch, it is not true that the shipowner was in a position to decide whether it needed repair; if the winch was merely in less than perfect condition, but serviceable and capable of being used with reasonable safety, no need to fix it then and there arose. But if the stevedore could not devise a safe way to load cargo with the winch, then it needed to be fixed. Thus the

---

[38]Italia Societa per Azioni di Navigazione v. Oregon Stevedore Co., 376 U.S. 315, 323 (1964).

[39]Munoz v. Flota Merchante Grancolombiana, S.A., 553 F.2d 837, 841 (2d Cir. 1977); Marant v. Farrell Lines, Inc., 550 F.2d 142, 144 (3d Cir. 1977).

stevedore company was better able to make that decision than the shipowner.

The court below may have supposed that imposing liability on the shipowner would increase the total cost arising from the accident and therefore the total incentive to provide safety. This assumption, however, is not correct, for even if it could be shown that third-party actions increase the total costs of accidents, it is also true that third-party actions relieve the stevedore of those costs and one cannot properly assume that the effect of any increase in the total costs will offset the inefficiencies introduced by shifting costs from the party with control to the party without it.

And, it cannot be demonstrated that tort actions against shipowners increase the total cost of accidents anyway, since the costs imposed through damage actions are computed differently from those imposed through the compensation system. A third-party tort judgment includes all of plaintiff's wage loss (although only for work expectancy), medical expenses and pain and suffering, but is then reduced for his comparative negligence. Compensation benefits under the 1972 Amendments have been increased to qualitatively higher levels,[40] and plaintiff recovers two-thirds of his wage loss and all of his medical expenses over his entire life[41] without reduction for comparative negligence. Factors such as age of the worker

---

[40]"Generally workers' compensation benefits are not intended to compensate for an employee's entire losses. . . . The 1972 Amendments to the Act, however, make a determined effort to narrow the gap between the harm suffered and the benefits payable." Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 261 n.9 (1979).

[41]For a white male worker, for example, who is 50 years old or older and planning retirement at 62, life expectancy is more than double work expectancy. U.S. Bureau of the Census, Statistical Abstract of the United States (1979) Table No. 101.

and the nature of his negligent conduct make generalizations about the relative values of negligence cases and compensation cases impossible.

Since the costs imposed directly on the shipowner by third-party actions cannot be predicted generally to be greater than the costs imposed on the stevedore company through compensation payments, the role of third-party actions in shifting costs from stevedore to shipowner must be considered. The stevedore company, at least when it is not negligent, is entitled to recover its compensation expenses from plaintiff's judgment[42] and to satisfy its liability for future compensation out of the amount plaintiff receives from his third-party action.[43] Third-party tort damages, therefore, first reimburse the stevedore company for its compensation expense and satisfy its future liability. Only when the amount of a judgment exceeds the total past and future compensation expense is the cost of the accident increased by anything other than the legal fees.

If a stevedore company which wrongfully contributes to plaintiff's injury is also entitled to recover its lien, as is an innocent stevedore company,[44] the third-party negligence action will result in a shifting of the costs in every case where a jury finds both at fault to any degree. In such a scheme safety will be promoted by applying negligence principles which cause such a shift only when the ship-

---

[42]Bloomer v. Liberty Mutual Insurance Co., 48 U.S.L.W. 4211, 4213 (March 3, 1980) (No. 78-1418).

[43]33 U.S.C. § 933(f) (1976).

[44]Whether Pope & Talbot v. Hawn, 346 U.S. 406 (1953), was still the law as late as 1972 or would be held now valid by the Court is a question not reached in *Edmonds*, 443 U.S. 256 (1979), or *Bloomer*, and not presented here. The argument may be made in some proper case that the stevedore cannot recover its lien if it has contributed to the accident by its fault, particularly by a breach of the Safety and Health Regulations for Longshoring, 29 C.F.R. Part 1918.

owner's failure of control was the primary cause of the injury. But under the result below the shift of costs to the shipowner would occur when the stevedore company's control and opportunity to avoid the accident were paramount and the shipowner's merely secondary or, in traditional tort terms, passive. The principles the shipowner urges will shift the burden to the shipowner when the shipowner has the better opportunity to avoid the accident because of superior knowledge or control or when its employees are careless in their actions. Otherwise the cost will remain on the contractor doing the work.

B. By Encouraging Frequent Third-Party Lawsuits, the Rule Below Subverts Primary Reliance on the Compensation Remedy

The Senate committee endorsed the 1972 Amendments because they would "provide an adequate, prompt, and equitable system of compensation for the over 800,000 employees who depend upon its protection."[45] Similarly, the House committee said:

> The objective of Congress in the matter of workmen's compensation is clear. It is to provide a modern workmen's compensation program for a substantial number of American workers and their families.[46]

Congress had ample cause for its belief that a workers' compensation system with adequate benefits was necessary to achieve both safety on the job and security for those who were injured. Experience had shown that the third-party action and the concomitant litigation over indemnity diverted financial resources which could be better used to pay compensation benefits, and workers were being encouraged to forego filing claims for compensation or delay their

---

[45]S. Rep. 92-1125 at 2.

[46]H.R. Rep. 92-1441 at 4711.

return to work to increase the recoveries in these third-party actions.[47]

The third-party actions continue to divert resources to attorneys for what is often little or no benefit to the injured worker, and in so doing undermine the security inherent in the compensation system. The act itself prohibits lump sum settlement of compensation liabilities except where "it is for the best interests of an injured person entitled to compensation."[48] The third-party lawsuit, however, is a device for routinely obtaining lump sum payment of future compensation, since the compensation carrier is thereby relieved of the duty to pay compensation until a credit equal to the amount received from the judgment has been exhausted.[49] Indeed, it is difficult to demonstrate that in any significant number of cases the third-party action serves any purpose other than to convert compensation benefits into a lump sum partial award and reward the attorney who obtains it with a fee unregulated by the compensation authorities.[50]

While it is true that Congress did not mean to abolish third-party actions under all circumstances, Congress did intend to provide an efficient compensation system on which

---

[47]S. Rep. 92-1125 at 9; H.R. Rep. 92-1441 at 4702-03. This Court, in Bloomer v. Liberty Mutual Insurance Co., 49 U.S.L.W. 4211 (March 3, 1980) (No. 78-1415), noted that Congress, in considering the 1972 Amendments, recognized that longshoremen's lawyers, rather than injured longshoremen, "were found to have been the primary beneficiaries of third party actions in the past". 48 U.S.L.W. at 4214 n.11; *see also* the dissenting opinion of Justice Blackman, 48 U.S.L.W. at 4217.

[48]33 U.S.C. §§ 908(i) and 916 (1976).

[49]33 U.S.C. § 933(f) (1976).

[50]Control over attorneys' fees in connection with the compensation award is committed to the Benefits Review Board, and receiving any additional fee is a crime. 33 U.S.C. § 928 (1976).

longshoremen could rely for prompt, fair and secure benefits following industrial accidents. Since third-party actions undermine the permanence and the security of the remedy, such actions ought to be restricted to those which foster the achievement of one or another of Congress' other goals for the 1972 Amendments. The decision below would subvert the compensation system and cause the proliferation of third-party actions. Third-party actions brought according to the principles of general negligence law, on the other hand, will restrict third-party recoveries to their proper role as incidental to primary reliance upon compensation.

C. The Rule Below Fails to Take Account of Other Rules Restricting the Fair Distribution of Loss

The very idea of limits on the shipowner's duty was rejected by the court below in an effort to avoid any rule "which prevents inquiry into the reasonableness of conduct under the circumstances of a given case".[51] If such limits, however, succeed in avoiding the imposition of liability on the shipowner when it has been minimally responsible and the stevedore company has been greatly at fault, the effect of certain inequities under the 1972 Amendments may also be avoided. In the *Edmonds* case[52] this Court found it inequitable but inevitable that a minimally negligent shipowner must pay the entire judgment, regardless how much the fault of the stevedore employer contributed to the accident. There is no other means of spreading the burden between the shipowner and stevedore in proportion to fault since the Amendments themselves bar indemnity, even by contract,[53] and the *Edmonds* holding confirms the absence

---

[51]Pet. App., p. B-16, 598 F.2d at 488, *citing* Gallardo v. Westfal-Larsen A/S, 435 F. Supp. 484, 496 (N.D. Cal. 1977).

[52]443 U.S. 256 (1979).

[53]33 U.S.C. § 905(b) (1976).

of a right of contribution.[54] Since proportional fault and contribution as methods of achieving fairness and promoting safety[55] are foreclosed and another must be chosen, the best remaining choice is a rule which exonerates a minimally responsible party in preference to a rule which imposes all liability on that party for the benefit of the primary wrongdoer.

The collateral source rule may apply to keep evidence of compensation benefits from the jury and provide added incentive for an unfair judgment against a remotely responsible shipowner.[56] Since juries undoubtedly share the view that the costs of industrial injuries ought to be borne by the industry and not by the injured worker, one cannot pretend that a jury is conducting an inquiry into the reasonableness of the shipowner's conduct under all the circumstances if the jury is kept unaware that the basic costs of plaintiff's injuries are already borne by industry. If the jury were to be informed that the proceeds of the lawsuit went to satisfy the claims of the employer, its sense of justice might affect the result.

III

THE RESULT BELOW IS BASED UPON FAULTY LEGAL ANALYSIS

A. The Court below Erred By Attempting to Fashion New Rules

The court below misinterpreted the task before it. Rather than accede to the congressional directive to apply general tort principles, the Court of Appeals read the legislative

---

[54]*See also* Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 285 (1952).

[55]United States v. Reliable Transfer Co., 421 U.S. 397 (1975); Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974).

[56]*See* Hawkins v. United Overseas Export Lines, Inc., No. Y-79-1320 (D. Md., April 15, 1980).

history "as calling upon the federal courts to *fashion a negligence standard* responsive to five specific concerns." (Emphasis supplied.) Pet. App., p. B-7; 598 F.2d at 484. The court did not cite any legislative history nor any appellate authority in support of its understanding of its mandate, and there is no such authority since, as we have shown, Congress did not call upon the courts to *fashion* anything, but simply to apply general principles of land-based tort law.

B. The Court Misused the Legislative History

In support of its standard, the court below cited the district court opinion, even then already reversed, in *Anderson v. Iceland Steamship Co.*[57] and the illustration of the grease spot taken from the legislative history. Pet. App., p. B-11, 598 F.2d at 486 n.2. That illustration, however, provides no support for the court's departure from general tort principles; it was merely an example used by the committees to illustrate the fundamental distinction between negligence and unseaworthiness. Congress knew that a defendant's actual or constructive knowledge, while irrelevant to an unseaworthiness action, is the hallmark of a negligence action.[58] The committees, intent on abolishing the unseaworthiness remedy and preserving a remedy for negligence, restated the illustration to show that a dif-

---

[57]431 F. Supp. 869 (D. Mass. 1977), *rev'd*, 585 F.2d 1142 (1st Cir. 1978).

[58]"For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it." S. Rep. No. 92-1125 at 9; H.R. Rep. No. 92-1441 at 4702; *cf.* Mitchell v. Trawler Racer Inc., 362 U.S. 539, 542, 549-50 (1960).

ferent result would occur after the amendments.[59] Thus, the illustration does not stand for the proposition that knowledge alone creates a duty to act.[60]

C. The Result Below Is Not Supported by Rules of State Law Governing Industrial Accidents

We have shown that the majority of states also have rules like those urged here and expressed in Restatement sections 343, 343A and 409, *et seq.*, for resolving negligence actions brought by employees of independent contractors. See Appendices I & II. The court below did not consider any of these authorities. Another common situation giving rise to industrial accident claims is that of general contractor and subcontractor, distinguished from that of the usual independent contractor by the greater control exercised over a subcontractor.[61] The exercise of that control by the general contractor makes him the "statutory

---

[59]"So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore." S. Rep. No. 92-1125 at 10-11; H.R. Rep. No. 92-1441 at 4704.

[60]In an alternative approach to analyzing the grease spot example, Judge Friendly, in his dissenting opinion in Canizzo v. Farrell Lines, Inc., determined that the key terms used by the Committees in the example were "willfully or negligently" and "reasonable care under the circumstances", and found that reasonable care could not require the vessel to act to protect the longshoreman if it could properly expect the stevedore to do so. 579 F.2d 682, 688 n.5 (2d Cir. 1978).

[61]2A A. Larson, The Law of Workmen's Compensation § 72.31, at 14-58 (1978).

employer" in the vast majority of states and so immune from tort liability in most instances.[62] Thus in a large number of jurisdictions, the exercise of control over a contractor which would be sufficient to impose liability for negligence leads to immunity under the compensation statutes.[63]

Under the law of most states, therefore, the employer of a contractor is not held liable in tort under any such open-ended standard as reasonable care in the circumstances unrestricted by the Restatement rules of duty.[64]

D. The Court Below, in Failing to Focus Its Analysis Upon the Scope of the Shipowner's Duty, Falsely Perceived and Analyzed Problems Concerning Contributory Negligence and Assumption of Risk

The opinion below attempts to set forth a "standard of negligence" for actions under section 905(b). Pet. App., p. B-11, 598 F.2d at 484. The term, however, is not defined by the court and apparently includes both the standard of care and scope of duty.

As a standard of care, the formula stated by the Ninth Circuit, "reasonable care under the circumstances", is consistent with the historical concept of negligence. But before

---

[62]*Id.* at 14-47 to 14-55.

[63]*See, e.g.* Stevens v. Colorado Fuel & Iron, 24 Utah 2d 214, 469 P.2d 3 (1970).

[64]California and New York are two notable exceptions, but those systems expressly permit vicarious liability rejected by Congress for the 1972 Amendments. Griesel v. Dart Industries, Inc., 23 Cal. 3d 578, 153 Cal.Rptr. 213, 591 P.2d 503 (1979); Allen v. Cloutier Construction Corp., 44 N.Y.2d 290, 405 N.Y.S.2d 630, 376 N.E.2d 1276 (1978). Massachusetts is the only state which may have a rule like that propounded below (Poirier v. Town of Plymouth, . . Mass. . ., Mass. Adv. Sh. (1978) 100, 372 N.E.2d 212 (1978)), but it did not have it in 1972, the relevant time for considering Congress' view of the general land-based law. Afienko v. Harvard Club, 365 Mass. 320, 312 N.E.2d 196 (1974).

one comes to the question of the standard of care, one must determine whether there is a duty at all.

A cause of action for negligence consists of four basic elements: duty, breach of duty, proximate cause, and damages. The standard announced below, however, fails to address the first element in its emphasis upon the second. It is not sufficient to say that the defendant failed to exercise reasonable care; the defendant cannot be liable unless he is first placed under some duty to exercise this level of care.[65] One may avoid a separate duty question when dealing with the consequences of clear-cut action, but when the "conduct" is less active and verges on a mere failure to act, the concept of duty has historically come into play.[66]

By requiring a vessel to supervise its independent contractors, which would be the inevitable result of simply adopting the "reasonable care under the circumstances" approach, the lower court assumed or created a new relationship requiring an affirmative duty to act, and in so doing has fashioned new law rather than follow the legislative mandate to incorporate existing land-based law principles.

Failure to focus adequately upon duty caused the court below to reject the scope of duty expressed in Restatement sections 343 and 343A on the ground that these Restatement sections limit liability through the defenses of contributory negligence and assumption of risk (Pet. App., p. B-13, 598 F.2d at 486), both of which, as absolute bars, are rejected by Congress. The court below failed to recognize that the proper scope of the duties set forth in Restatement sections 343 and 343A, as well as the scope proposed for adoption by this Court, are independent of the actual

---

[65]W. Prosser, Law of Torts 143 (4th ed. 1971).

[66]"In the determination of the existence of a duty, there runs through much of the law a distinction between action and inaction." *Id.* at 338; *see also* Restatement sections 284, 314, 315 (1965).

behavior of the plaintiff or his independent contractor employer. Instead, the scope of the duty is defined by the vessel owner's reasonable expectations of the expert independent contractor's actions and abilities and resultant duty. Once it is determined that there was no duty or that the duty was met, the shipowner should not be found liable simply because the doctrines forbidden by Congress would have produced the same result, if the necessary facts were found. A holding that the defendant shipowner owed no further duty of supervision does not mean that the recovery has been barred by contributory negligence or assumption of risk.[67]

E. The Court Misunderstood and Misapplied the Holding of this Court in Kermarec v. Compagnie Generale Transatlantique

Kermarec v. Compagnie General Transatlantique[68] dealt with whether a vessel could avoid liability to a social guest of a seaman, injured while visiting on board a ship, on the ground that under New York law the guest was a licensee who could not recover without proof that the shipowner had actual knowledge of the dangerous condition which had injured him. The court below labored under three misapprehensions about *Kermarec*. First, it asserted that *Kermarec* rejected the incorporation of the "law of invitees", when what the Court rejected was the rule relating to licensees. Second, the court below assumed that *Kermarec* set forth land-based law, when it actually rejected land law in favor of an uniquely maritime rule. Third, the court below found *Kermarec* to stand for the proposition that "reasonable care under the circumstances" is the duty owed in all negligence cases. The language of *Kermarec,* however, disproves this. The Court fully recog-

---

[67]Riddle v. Exxon Transp. Co., 563 F.2d 1103, 1110 (4th Cir. 1977).

[68]358 U.S. 625 (1959).

nized that different classes of persons do exist even in maritime law, with correlative, different duties of care owed to them.[69]

It is not proposed that this Court adopt the common law classification of "licensees" and thereby impose some duty standard lower than that generally applicable to invitees (the highest of standards except for special relationships, such as employment). Rather, it is submitted that the duties owed by an owner of premises to one generally classified as an invitee provide a guide for determining the appropriate duties of a vessel to the employees of its independent stevedore contractor. The status of independent contractor must necessarily have some effect upon the duties of the vessel to take affirmative action to inspect and supervise the contractor's work. Given the legislative mandate to apply land-based principles, the duties set forth in the formulations of the Restatement are appropriate analogies, and it is unimportant whether one recognizes the common law distinction between invitees and licensees dealt with in *Keramarec* since it is not suggested here that longshoremen be regarded as licensees.

This Court has never indicated that the *Kermarec* decision is inconsistent with Restatement principles. On the contrary, *Kermarec* was decided at a time when the Court assumed the vitality of such principles. The Court has therefore continued to cite the two together. Almost contemporaneously with *Kermarec* the Court decided *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*,[70] in which it recognized the principle that a shipowner's duties include responsibility "to correct or warn [stevedore] of a latent dangerous condition known to [shipowner] when [stevedore] began."[71]. The next term, the Court decided

---

[69]358 U.S. at 632, n.9.

[70]355 U.S. 563 (1958).

[71]*Id.* at 568.

West v. United States[72] recognizing that both "control" and latency were relevant.[73]

The Court has since cited *Kermarec* and the Restatement principles themselves in the same breath. In *Federal Marine Terminals v. Burnside Shipping Co.*[74] the Court recognized *Kermarec* as holding that

> the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.[75]

The Court evidently did not view this statement, however, as abrogating the limitations on a shipowner's duty to oversee and supervise the work of the stevedore for the protection of the longshoremen, as it also quoted the duty standards set forth in *Hugev* and *Mickle,*[76] including reference to Restatement of Torts, sections 341 and 343, as standards applied by other courts in deciding this issue.

---

[72]361 U.S. 118 (1959). See text accompanying notes 25 & 26 *supra.*

[73]*Id.* at 124.

[74]394 U.S. 404 (1969).

[75]394 U.S. at 415, quoting *Kermarec,* 358 U.S. at 632.

[76]394 U.S. at 415, 416-17 n.18. See Hugev v. Dampskisaktieselkabet International, 170 F.Supp. 601 (S.D. Cal. 1959), *aff'd sub nom.* Metropolitan Stevedore Co. v. Dampskisaktieselskabet International 274 F.2d 875 (9th Cir.) (adopting district court opinion), *cert. denied,* 363 U.S. 803 (1960); Mickle v. The Henrietta Wilhemine Schulte, 188 F. Supp. 77 (N.D. Cal. 1960). See discussion at notes 22-24, *supra* and accompanying text.

F. The Rule of the Court Below Is Based on an Unacceptable Derogation From the Principle That Longshoremen and Stevedore Contractors Must Stop Work When Conditions Are Dangerous if the Waterfront Is to Be Made Safer

The assertion that longshoremen "face trouble for delaying work"[77] has been discredited by this Court's approval, in *Whirlpool Corp.* v. *Marshall*[78], of the right conferred by OSHA regulations to walk off an unsafe job. The opinion below ignored congressional and judicial efforts to promote safety through conscientious enforcement of the OSHA regulatory scheme and gave grounds for optimism to those who might hope to make a longshoreman "face trouble for delaying the work."

In addition to being outdated, wrong and dangerous, the Ninth Circuit views on stopping work missed the point. The scope of the shipowner's duty does not depend on the rights of the individual longshoremen or the knowledge possessed by individual longshoremen of particular dangers aboard the vessel. The standard depends upon what the shipowner may reasonably expect the expert *stevedore company* (not the individual longshoremen) to be able to do when confronted with conditions requiring special care. The stevedore company has an unquestioned power and

---

[77]Pet. App., p. B-17, 598 F.2d at 488.

[78]48 U.S.L.W. 4189 (February 26, 1980) (No. 78-1870).

obligation to stop working in a dangerous manner, to find a way to do the work safely[79] and to charge the cost of it, along with any stand-by time, to the shipowner who also suffers the loss of any delay to its vessel. No one has suggested that a stevedore company faces trouble for doing so. And it is the one sure-fire method which imposes the costs of unsafe conditions on the shipowner and prevents injuries at the same time.

The standard announced below assumes the helplessness of individual longshoremen and ignores the power and duty of their stevedore employer to refuse to work in a dangerous manner. It is inappropriate to base the shipowner's duty on the assumption, and sanction, of such ignorance.

IV

THE RULING BELOW HAS A SUBSTANTIAL ADVERSE IMPACT UPON SHIPOWNERS' LIABILITIES AND THE ABILITY TO DISPOSE OF UNMERITORIOUS CASES

A. By Eliminating Traditional Threshold Requirements, the Rule Makes It Impossible to Dispose of Clearly Unmeritorious Cases Without Full Trial

Before the Court of Appeals' decision in this case, the courts were generally applying traditional rules limiting

---

[79]Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978); Slaughter v. S.S. Ronde, 390 F. Supp. 637, 640 (S.D. Ga. 1974), *aff'd*, 509 F.2d 973 (5th Cir. 1975); Ramirez v. Toko Kaiun, K.K., 385 F. Supp. 644 (N.D. Cal. 1974). Of course, the right to stop work in the face of dangerous conditions was well established prior to the passage of the 1972 Amendments. In Brock v. Coral Drilling Inc., the Court of Appeals for the Fifth Circuit stated:

> It is clear . . . that a stevedore must not continue to work its crew in the face of an unsafe or unseaworthy condition. Rather, it must remedy the situation itself, have the shipowner remedy it, or stop the operation. 477 F.2d 211, 216 (1973);

See also Albanese v. N/V Nederl. Amerik Stoomv. Maats., 346 F.2d 481, 484 (2d Cir.), *rev'd per curiam*, 382 U.S. 283 (1965).

the shipowner's duty to protect the longshoremen in cases in which the hazard was known or obvious to the stevedore contractor[80] or control had been relinquished to the stevedore contractor[81] or the injury was clearly due to an act or omission of the contractor.[82]

Under these traditional standards, summary judgment was available in many instances.[83] This had direct results, not only in the economical disposition of particularly unmeritorious cases in which the stevedore's responsibility for the injury had been manifest while the shipowner's responsibility had been remote or nonexistent, but in discouraging counsel from filing similar cases of little or no essential merit as an alternative to reliance upon compensation benefits.

---

[80]Cases collected at note 27, *supra.*

[81]Cases collected at note 29, *supra.*

[82]Cases collected at note 28, *supra.*

[83]*E.g.*, Roberts v. Andrew Martin Sea Services, Inc., No. 78-2219 (5th Cir. May 30, 1980); McCullough v. S/S Coppename, 608 F.2d 208 (5th Cir. 1979) (opinion withdrawn); Briley v. Charente S.S. Co., 572 F.2d 498 (5th Cir. 1978); Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977).

Directed verdicts[84] and judgments n.o.v. upon the same grounds[85] have had the same effect of encouraging longshoremen and their lawyers to rely upon the liberal compensation benefits now available rather than a damage suit of little or no merit. Thus, the application of traditional standards has no doubt resulted in the filing of notably fewer cases.

Regardless of actual merit, it is notoriously difficult to deal with reasonable care questions by motion.[86] But the duty standard announced by the court below eliminates the traditional threshold questions and is dependent upon issues of reasonable care at every point. It would hold the ship to reasonable care to protect the longshoremen from every condition which reasonable care would discover, whether known or unknown, obvious or otherwise, and

---

[84]*E.g.*, Stockstill v. Qypsum Transp., 607 F.2d 1112 (5th Cir. 1979); Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977); Bess v. Agromar Line, 518 F.2d 738 (4th Cir. 1975).

[85]*E.g.*, Mattivi v. South African Marine Corp., 618 F.2d 163 (2d Cir. 1980); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977); Rich v. U.S. Lines, Inc., 596 F.2d 541 (3d Cir. 1979); and *cf.*, *e.g.*, following cases reversed on appeal where a judgment n.o.v. should have been granted: Anderson v. Iceland S.S. Co., 431 F.Supp. 869 (D. Mass. 1977), *rev'd*, 585 F.2d 1142 (1st Cir. 1978); Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798 (2d Cir.), *cert. denied*, 439 U.S. 881 (1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449 (2d Cir. 1978); Munoz v. Flota Merchante Grancolombiana, S.A., 553 F.2d 837 (2d Cir. 1977); Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977); Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977); Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979); Wescott v. Impresas Armadoras, S.A., 564 F.2d 875 (9th Cir. 1977).

[86]Gross v. Southern Railway, 414 F.2d 292, 296 (5th Cir. 1969); *see also* Arney v. United States, 479 F.2d 653, 660 (9th Cir. 1973); Trotter v. Anderson, 417 F.2d 1191, 1192 (7th Cir. 1969).

regardless who were in charge and whose act or omission were involved.[87]

Thus the Court of Appeals has resubmerged in the generality of "reasonable care" those essential and discriminating qualifications which American courts, in their experience of thousands of decisions, have identified and raised out of it over the years, and the result is that the prospect is presented of drawing out every case through trial, however slight its essential merit in all the circumstances. With the cost of litigation at present levels, this has the effect of creating a large bargaining counter for possible settlement, regardless of merit. The prospect of obscuring the stevedore contractor's primary safety responsibilities and the liberality of compensation benefits, together with the threat to defendants created by the increased cost of proceedings, will encourage the filing of more cases and less meritorious ones and increase not only the private costs of determining their merit, but also costs which are passed on to the public.

B. The Ruling Below, Augmented by Misinterpretations of the Edmonds Decision, Has Led to the Imposition of Even Further Burdens Upon the Shipowner

As though it were dealing with a subject of which there had not been vast industrial and judicial experience, the court below proposed a duty standard devoid of concrete qualification for the guidance of courts and juries. The expression "under the circumstances" has proved too vague and general and has produced results inconsistent with congressional policy.

The same court, a little less than four months after its decision in *Santos,* relied upon its *Santos* opinion in de-

---

[87]Pet. App., p. B-11; 598 F.2d at 485.

ciding *Bachtel* v. *Mammoth Bulk Carriers, Ltd.*[88] Ignoring the most important of circumstances, the court there appeared to reject consideration of the stevedore's function and its conceded negligence in determining fault of the vessel. It then attempted to support the position by citing this Court's *Edmonds* decision, which dealt with a considerably different issue.[89] Having thus peremptorily decided that the violation of OSHA regulations by a stevedore contractor, to whom they were exclusively directed, could not be viewed as in any degree a shield for the shipowner, the court went quickly on to fashion the regulations into a sword and hand it to the plaintiff longshoreman.[90]

Next, despite the weight of numerous contrary opinions in its own and other circuits, the Court of Appeals for the Seventh Circuit, in *Matthews v. Ernst Russ Steamship Co.*,[91] again acknowledging the inspiration of *Santos*, also ignored the stevedore's control of the area and the activities therein as a circumstance of importance to be taken into account. It again cited this Court's *Edmonds* decision as authority for doing so.[92] The court dealt similarly

---

[88]605 F.2d 438 (9th Cir. 1979), No. 79-538 on petition for certiorari in this Court.

[89]605 F.2d 438, 443 (9th Cir. 1979). The following day, the same court apparently did the same thing, again on the authority of the *Edmonds* case, in Lawson v. United States, 605 F.2d 448, 453 (9th Cir. 1979). Although the inartful language would make it appear that negligence of the stevedores was urged as a general bar to vessel owner liability, this was not the argument made by the shipowner. Indeed, in *Lawson*, the shipowner explicitly disavowed any theory of a bar based on the existence of stevedore negligence. Reply Brief for the Appellant at 5, Lawson v. United States.

[90]605 F.2d at 444-46.

[91]603 F.2d 676 (7th Cir. 1979) No. 79-624 in this Court.

[92]603 F.2d at 680. Likewise, in Johnson v. A/S Ivarans Rederi, 613 F.2d 334, 350 (1st Cir. 1980), the same view was taken in rejecting jury instructions which were admittedly good law and would have called the attention of the jury to the functions of the stevedore, the court appearing to think that it was not relevant to

with the circumstance that the defect of the ladder there in question was known or obvious and supported its indifference by further reference to the *Edmonds* case.[93] With such momentum and a growing conviction of the serviceability of the *Edmonds* case, the court went on to cite it finally as authority that, since the 1972 Amendments, the heavier burden of the causation rule heretofore restricted to FELA and Jones Act cases should be laid upon the shipowner in longshoremen's suits;[94] such a proposition flies in the face of this Court's statement in *Edmonds* that liability arises only when the shipowner's negligence is a "substantial factor" in causing the plaintiff's injury.[95]

This pattern has been brought to a climax in *Johnson v. A/S Ivarans Rederi*[96] where the court, building again on *Santos* and its progeny and rejecting the great body of contrary authority, announced the extravagant conclusion: "Doubt as to the interpretation of the Act and the development of standards of care implementing it must be resolved in favor of the longshoreman," citing the *Edmonds* case for the proposition.[97]

Nothing in the evidence of Congressional intent nor, for that matter, anything explicit in the *Santos* opinion itself, justifies so mischievous a line of doctrinal development, and surely nothing in this Court's *Edmonds* opinion provides the support for which it is so frequently cited.

---

the issues of the case to state such matters as that the shipowner was not responsible for the conduct of the stevedore contractor or that there was no duty on the ship to supervise or oversee the contractor's work.

[93]603 F.2d at 679-80.

[94]603 F.2d at 681.

[95]443 U.S. 256, 271 n. 30; *see also id.* at 265 n. 15.

[96]613 F.2d 334 (1st Cir. 1980), No. 79-1589 in this Court on petition for certiorari.

[97]613 F.2d at 347-48.

V

THE DECISION OF THE TRIAL COURT WAS CORRECT

A. The Trial Court Correctly Decided That the Shipowner Had Not Been Negligent

The district court properly concluded that the shipowner could not be found negligent under the standards of Restatement sections 343 and 343A, and it would have reached the same result under the standard Petitioner proposes.

Under Restatement sections 343 and 343A there is no doubt that any defective condition of the winch was both obvious and actually known to the supervisory personnel of the stevedore company, since no one disputes that longshoremen "had complained to superiors . . . ."[98] The condition was, moreover, obvious enough that the shipowner was thought to be possibly chargeable with knowledge simply because it had agents walking through the area.[99]

Obviousness alone is not enough under the standard applied by the district court. A landowner may be liable under section 343A if he should have anticipated harm despite the obviousness of the condition.[100] But there was certainly no reason for a shipowner to expect that a stevedore contractor, in control of the operation and continuing to work without complaint despite a regulation requiring it to report any defect in the winch to the ship,[101] would not deal safely with the winch.

---

[98]Pet. App., p. B-19, 598 F.2d at 489.

[99]*Id.*

[100]*See* Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976).

[101]29 C.F.R. § 1918.53(a)(5) provides:

> Any defect or malfunction of winches shall be reported immediately to the officer in charge of the vessel.

The standard Petitioner proposes leads to the same conclusion reached by the trial court since the condition was obvious and under the control of the stevedore company.

Plaintiff proposed to prove no more than that the defect might have existed prior to the commencement of the work and then to hope that a jury would find negligence. Under the pre-1972 law, as recognized in the Ninth Circuit, such proof is insufficient. In *Partenweederei, MS Belgrano v. Weigel*,[102] Weigel's unseaworthiness claim had failed because he lacked the status to maintain it and he urged a negligence theory based upon a malfunction in the ship's winch discovered by longshoremen the day before the accident but not reported to the crew. The district court held there had been negligent inspection, but the Court of Appeals reversed.

> What did libelant establish? He established: (1) That the accident occurred; (2) That it occurred because of the malfunctioning of the pawl and ratchet device; and (3) That the stevedores discovered the malfunctioning of the device shortly after cargo loading operations commenced on the day before the accident. From these facts, libelant contends that the District Court properly inferred that a reasonable inspection by respondents would have revealed the cause of the malfunctioning. The vice of that argument is the absence from the record of any testimony establishing, or tending to establish, the standard of conduct which respondents were required to meet in discharge of their duty to make a reasonable inspection to see that the gear and equipment furnished by them operated properly . . . .
>
> On the record in this case, we are constrained to hold that the libelant failed to meet the burden of

---

[102]299 F.2d 897 (9th Cir.), *cert. denied*, 371 U.S. 830 (1962).

> proof resting upon him of establishing negligence on the part of the respondents.[103]

Santos did not offer to prove any more than Weigel had, and because pre-1972 negligence cases such as *Hugev, West*[104] and *Belgrano* should be persuasive, Santos should succeed no better than Weigel.

B. The District Court Properly Decided That Any Defect in the Winch Was Not a Proximate Cause of the Accident

The trial judge decided that any defect in the winch had not been a proximate cause of Santos' accident.[105] The decision was proper. The question of proximate causation on undisputed facts or facts assumed as plaintiff would have them is a legal question properly decided by the court,[106] as the court below itself has done under the 1972 Amendments.[107] Given the facts surrounding the accident, including the stevedore's exclusive control over the winch and the unloading operation, and the reasonable expectations of the shipowner regarding the stevedore's supposedly safe work methods, the district court's finding that the alleged

---

[103]299 F.2d at 904. Part of this case concerning the indemnity was vacated, 302 F.2d 730 (9th Cir. 1962). The substantive portion of the case, dealing with Weigel's failure of proof, has been subsequently cited with approval in Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303 (9th Cir. 1970).

[104]See Section I, *supra.*

[105]Pet. App., p. A-5.

[106]W. Prosser, The Law of Torts 241 (4th ed. 1971).

[107]"For this court to uphold plaintiff's verdict and ignore the fact that [the stevedore] had control of the unloading process, had knowledge of the nature and attendant dangers of the cargo, and by proper unloading techniques . . . could have prevented the injury to Davison is to ignore the proximate cause of this accident." Davison v. Pacific Inland Navigation Co., 569 F.2d 507, 514 (9th Cir. 1978).

defect was not a proximate cause of plaintiff's injury was correct.[108]

C. The Trial Court Was Not Guilty of Making "Findings" on Material Issues

The Court of Appeals reversed because it found there were disputed issues of fact material to the standard it fashioned, and it asserted that the trial court had resolved those disputes.[109] Actually, the trial court had not resolved those issues; it ignored disputes as to issues not material under the proper standard and assumed the plaintiff's version on those which might have been material.

First, the Court of Appeals faulted the district judge for deciding whether or not the shipowner had gained knowledge of the slipping of the winch.[110] But since it did not matter whether the shipowner could have discovered the defect in the winch, the issue was not material. Under any proper standard, no duty to take action arises from knowledge of such an obvious condition under the control of the stevedore company.[111]

Second, if the trial court failed to make a distinction between "control" and "exclusive control",[112] such a point has no bearing on the outcome. The control, whether exclusive or not, exercised by the stevedore company was sufficient to enable it to protect its employees. The winch

---

[108]See for example, Cox v. Flota Merchante Grancolombiana, S.A., 577 F.2d 798, 802 (2d Cir.), *cert. denied*, 439 U.S. 881 (1978); McCullough v. The S/S Coppename, 608 F.2d 208, 211 (5th Cir. 1979); Gay v. Ocean Transport & Trading, Ltd., 546 F 2d 1233, 1242 (5th Cir. 1977).

[109]Pet. App., p. B-18, 598 F.2d at 489.

[110]Pet. App., pp. B-18 to B-20, 598 F.2d at 489-90.

[111]Albanese v. N.V. Nederl. Amerik Stoomv. Maats., 346 F.2d 481 (2d Cir.), *rev'd per curiam*, 382 U.S. 283 (1965).

[112]Pet. App., p. B-21, 598 F.2d at 490; *cf.* Pet. App., p. A-4; Pre-Trial Order, A.11.

was not being operated by crew members, and the stevedore company possessed all the control it needed to stop working if there was a defect to be corrected.

Third, the trial court did not ignore the claim that the "jumpiness" of the winch caused the initial spillage. On the contrary, it assumed from the outset that a defect had caused the injury, as claimed by the plaintiff.[113]

Fourth, the Court of Appeals also claimed that the trial court had attributed the second spillage to swinging of the pallet and not to the defect.[114] (Did the court really mean to suggest that the district court failed to consider that the defect caused either spillage? The district court had, after all, taken explicit note that the "jumpiness" was obvious.) Since the trial court held the shipowner not liable for the condition which permitted the load to slip, it mattered not whether that condition caused the first spillage, the second, or both.

---

[113]Pet. App., pp. A-3 & A-5, *cf.* Pet. App., p. B-22, 598 F.2d at 490.

[114]Pet. App., p. A-3, 598 F.2d at 490.

CONCLUSION

For the foregoing reasons the Court should reverse the judgment of the Court of Appeals for the Ninth Circuit and thus restore the summary judgment entered by the district court and should also explicitly recognize the duty standard provided by land-based law, as set forth above, for the guidance of lower courts in future cases.

Respectfully submitted,

GRAYDON S. STARING
Attorney for Petitioner

LEGROS, BUCHANAN, PAUL & MADDEN
ROBERT H. MADDEN

LILLICK MCHOSE & CHARLES
EDWARD M. KEECH
Of Counsel

(Appendices Follow)

APPENDIX I

Alabama: Hughes v. Hughes, ... Ala. ....., 367 So.2d 1384 (1979).

Alaska: Ferriss v. Chugach Electric Association, 557 P.2d 763 (Alaska 1976).

Arizona: Pruett v. Precision Plumbing, Inc., 27 Ariz. App. 288, 554 P.2d 655 (1976).

Arkansas: Dunn v. Brown & Root, Inc., 455 F.2d 717 (8th Cir. 1972).

Gordon v. Matson, 246 Ark. 533, 439 S.W.2d 627 (1969).

Colorado: J & K Construction Co. v. Molton, 154 Colo. 214, 390 P.2d 68 (1964).

Connecticut: Christiano v. Cunningham-Limp Co., 29 Conn. Supp. 361, 288 A.2d 448 (1971).

Delaware: Seeney v. Dover Country Club Apartments, Inc., 318 A.2d 619 (Del. Super. Ct. 1974).

Hamm v. Ramunno, 281 A.2d 601 (Del. Ch. 1971).

Florida: Rist v. Florida Power & Light Co., 254 So.2d 540 (Fla. 1971) (per curiam).

Georgia: Hodge v. United States, 310 F.Supp. 1090 (M.D. Ga. 1969), *aff'd per curiam,* 424 F.2d 545 (5th Cir. 1970).

Hawaii: Pickard v. Honolulu, 51 Haw. 134, 452 P.2d 445 (1969).

Illinois: Nowicki v. Union Starch & Refining Co., 54 Ill.2d 93, 296 N.E.2d 321 (1973).

Indiana: Dismore v. Aetna Casualty & Surety Co., 338 F.2d 568 (7th Cir. 1964).

Iowa: Clinton Foods, Inc. v. Youngs, 266 F.2d 116 (8th Cir.), *cert. denied,* 361 U.S. 828 (1959).

Kansas: Graham v. Loper Electric Co., 192 Kan. 558, 389 P.2d 750 (1964).

Kentucky: Olds v. Pennsalt Chemicals Corp., 432 F.2d 1033 (6th Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

Louisiana: McIlwain v. Placid Oil Company, 472 F.2d 24 (5th Cir.), *cert. denied,* 412 U.S. 923 (1973).

Maine: Stanley v. United States, 476 F.2d 606 (1st Cir. 1973).

Levesque v. Fraser Paper, Ltd., 159 Me. 131, 189 A.2d 375 (1963).

Maryland: Bauman v. Woodfield, 244 Md. 207, 223 A.2d 364 (1966).

Le Vonas v. Acme Paper Board Co., 184 Md. 16, 40 A.2d 43 (1944).

Mississippi: Downs v. Corder, 377 So. 2d 603 (Miss. 1979).

Missouri: Kelly v. Dairy Queen Enterprises, Inc., 581 S.W.2d 903 (Mo. Ct. App. 1979).

Montana: Shannon v. Howard S. Wright Construction Co., 593 P.2d 438 (Mont. 1979) (citing Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976)).

Nebraska: Dorman v. United States, 268 F.Supp. 249 (D. Neb. 1967).

Laaker v. Hartman, 186 Neb. 774, 186 N.W.2d 494 (1971).

New Hampshire: MacLean v. Parkwood, Inc., 247 F.Supp. 188 (D. N.H. 1965), *aff'd,* 354 F.2d 770 (1st Cir. 1966).

New Mexico: Madrid v. Mine Safety Appliance Co., 466 F.2d 856 (10th Cir. 1973).

North Carolina: Spivey v. Babcock & Wilcox Co., 264 N.C. 387, 141 S.E.2d 808 (1965).

Carey v. United States, 183 F.Supp. 727 (M.D.N.C. 1960).

Oklahoma: Hatley v. Mobil Pipe Line Co., 512 P.2d 182 (Okla. 1973).

Pennsylvania: Fisher v. United States, 441 F.2d 1288 (3d Cir. 1971).

Moore v. Sylvania Electric Products, Inc., 454 F.2d 81 (3d Cir. 1972).

Hader v. Coplay Cement Manufacturing Co., 410 Pa. 139, 189 A.2d 271 (1963).

Brletich v. United States Steel Corp., 445 Pa. 525, 285 A.2d 133 (1971).

Crane v. I.T.E. Circuit Breaker Co., 443 Pa. 442, 278 A.2d 362 (1971).

Rhode Island: Molinari v. Sinclair Refining Co., 111 R.I. 490, 304 A.2d 651 (1973).

South Carolina: Honea v. West Virginia Pulp & Paper Co., 380 F.2d 704 (4th Cir. 1967).

Tennessee: Wilson v. Electric Power Board, 544 S.W. 2d 92 (Tenn. 1976).

Utah: Texaco, Inc. v. Pruitt, 396 F.2d 237 (10th Cir. 1968).

Virginia: Atlantic Co. v. Morrisette, 198 Va. 332, 94 S.E.2d 220 (1956).

Washington: Fenimore v. Donald M. Drake Construction Co., 87 Wn.2d 85, 549 P.2d 483 (1976).

APPENDIX II

Alabama: Hughes v. Hughes, ... Ala. ....., 367 So.2d 1384 (1979).

Alaska: Deville v. Shell Oil Co., 366 F.2d 123 (9th Cir. 1966).

Hobbs v. Mobil Oil Corp., 445 P.2d 933 (Alaska 1968).

Arizona: Pruett v. Precision Plumbing, Inc., 27 Ariz. App. 288, 554 P.2d 655 (1976).

Arkansas: Gordon v. Matson, 246 Ark. 533, 439 S.W.2d 627 (1969).

California: Stanford v. Ontario, 6 Cal.3d 870, 101 Cal. Rptr. 97, 495 P.2d 425 (1972).

Connecticut: Darling v. Burrone Bros., Inc., 162 Conn. 187, 292 A.2d 912 (1972).

Delaware: Seeney v. Dover Country Club Apartments, Inc., 318 A.2d 619 (Del. Super. Ct. 1974).

Yates v. United States, 365 F.2d 663 (4th Cir. 1966).

Florida: Florida Power & Light Co. v. Price, 170 So.2d 293 (Fla. 1964) (per curiam).

Mount Dora v. Voorhees, 115 So.2d 586 (Dist. Ct. App. Fla. 1959), *cert. denied,* 119 So.2d 293 (Fla. 1960).

Georgia: Hodge v. United States, 310 F.Supp. 1090 (M.D. Ga. 1969), *aff'd per curiam,* 424 F.2d 545 (5th Cir. 1970).

Illinois: Foster v. National Starch & Chemical Co., 500 F.2d 81 (7th Cir. 1974).

Indiana: Wolfe v. Bethlehem Steel Corporation, 460 F.2d 675 (7th Cir. 1972).

Kentucky: Olds v. Pennsalt Chemicals Corp., 432 F.2d 1033 (6th Cir. 1970) *cert. denied,* 401 U.S. 1010 (1971).

Maryland: Walden v. Weinstein, 263 Md. 570, 284 A.2d 1 (1971).

Mississippi: Market Insurance Company v. United States, 415 F.2d 459 (5th Cir. 1969).

Missouri: Smith v. The Inter-County Telephone Co., 559 S.W.2d 518 (1977) (en banc).

Montana: West v. Morrison-Knudsen Co., 451 F.2d 493 (9th Cir. 1971).

Wells v. Stanley J. Thill & Associates, Inc., 153 Mont. 28, 452 P.2d 1015 (1969).

Nebraska: Simon v. Omaha Public Power District, 189 Neb. 183, 202 N.W.2d 157 (1972).

Dorman v. United States, 268 F.Supp. 249 (D.Neb. 1967).

Laaker v. Hartman, 186 Neb. 774, 186 N.W.2d 494 (1971).

New Jersey: Donch v. Delta Inspection Services, Inc., 165 N.J. Super. 567, 398 A.2d 925 (1979).

New York: New York law contains a statutory absolute duty to provide a safe place to work to the employees of independent contractors, but when such a provision does not apply, New York follows the rules stated.

Monroe v. New York, 67 App.Div.2d 89, 414 N.Y.S.2d 718 (2d Dept. 1979).

Oklahoma: Hatley v. Mobil Pipe Line Co., 512 P.2d 182 (Okla. 1973).

Pennsylvania: Byrd v. Merwin, 456 Pa. 516, 317 A.2d 20 (1974).

South Dakota: Blumhardt v. Hartung, 283 N.W.2d 229 (S.Dak. 1979).

Texas: Shell Chemical Co. v. Lamb, 493 S.W.2d 742 (Tex. 1973).

Utah: Texaco, Inc. v. Pruitt, 396 F.2d 237 (10th Cir. 1968).

Wisconsin: Snider v. Northern States Power Co., 81 Wis.2d 224, 260 N.W.2d 260 (1977).

APPENDIX III

Restatement (Second) of Torts (1965)

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§ 343A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

§ 388. Chattel Known to be Dangerous for Intended Use

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

§ 409. General Principle

Except as stated in §§ 410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.

§ 410. Contractor's Conduct in Obedience to Employer's Directions

The employer of an independent contractor is subject to the same liability for physical harm caused by an act or omission committed by the contractor pursuant to orders or directions negligently given by the employer, as though the act or omission were that of the employer himself.

§ 411. Negligence in Selection of Contractor

An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor

(a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

(b) to perform any duty which the employer owes to third persons.

§ 414. Negligence in Exercising Control Retained by Employer

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject

to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

§ 414A. Duty of Possessor of Land to Prevent Activities and Conditions Dangerous to Those Outside of Land

A possessor of land who has employed or permitted an independent contractor to do work on the land, and knows or has reason to know that the activities of the contractor or conditions created by him involve an unreasonable risk of physical harm to those outside of the land, is subject to liability to them for such harm if he fails to exercise reasonable care to protect them against it.

Supreme Court, U. S.
FILED
SEP 26 1980
MICHAEL RODAK, JR., CLERK

No. 79-512

IN THE

Supreme Court of the United States

October Term, 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

v.

LAURO DE LOS SANTOS AND SEATTLE STEVEDORE CO.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT, LAURO DE LOS SANTOS

JAMES A. GRUTZ
JACKSON, ULVESTAD,
GOODWIN & GRUTZ
Attorneys for Respondent,
Lauro De Los Santos

Office and Post Office Address:
1425 IBM Building
Seattle, Washington 98101
Telephone: (206) 623-2300

CRAFTSMAN PRESS SEATTLE, WASHINGTON

QUESTIONS PRESENTED FOR REVIEW

A. Did the Ninth Circuit Court of Appeals err when it held that the negligence cause of action referred to by Congress in the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 905(b), meant:

> A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel, if, but only if, the shipowner (a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize it involved an unreasonable risk of harm to such longshoremen, and
> (b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoreman against danger?

B. Whether, a longshoreman, injured in the course of his employment aboard a ship, by reason of the malfunction of a ship's winch, can be barred, as a matter of law on a motion for summary judgment from recovery against the shipowner for negligence, when the shipowner has failed to repair the winch which had been malfunctioning over a two and one-half day period?

C. Have the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act substituted contributory negligence and/or assumption of risk principles for comparative negligence principles in a longshoreman's claim against a shipowner for negligence for failing to provide a safe place to work and failing to maintain and repair a defective ship's winch?

TABLE OF CONTENTS

Page

Questions Presented for Review i

I. Applicable Statutes 1

II. Statement of the Case 2

A. Statement of the Case 2

B. Statement of Facts 3

III. Summary of Argument 7

IV. Argument 8

A. Background—Negligence Action Retained 8

B. Summary Judgment Inappropriate 12

C. The 1972 Amendments to the Longshoremen's and Harbor Workers Compensation Act Have Not Substituted Assumption of Risk and Contributory Negligence Principles for Comparative Negligence Principles 22

D. Negligence-Concurrent Negligence-Comparative Negligence 34

E. Safe Place to Work—Dangerous Conditions 36

F. Argument in Response to Petitioner's Brief 38

G. Response to Amicus Brief in Support of Petitioner 44

V. Conclusion 48

Appendix I I-1

Appendix II II-1

Page

TABLE OF AUTHORITIES

Table of Cases

Albanese v. N/V Nederl. Amerik Stomov. Maats, 346 F.2d 481 (2d Cir.), *rev'd per curiam*, 382 U.S. 283, 15 L. Ed. 2d 327, 86 S. Ct. 429, *reh. den.*, 382 U.S. 1000, 15 L. Ed. 2d 490, 86 S. Ct. 534 (1965) 38

Anuszewski v. Dynamic Mariners, 540 F.2d 757 (4th Cir. 1976) 24, 26

Arney v. United States, 479 F.2d 653 (9th Cir. 1973).... 13

Bender v. Dingworth, 425 F.2d 378 (5th Cir. 1970) 36

Bloomer v. Liberty Mutual Insurance Co., 100 S. Ct. 925 (1980) 9

Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977) 9, 32, 37

Cameron v. Vancouver Plywood Corp., 266 F.2d 535 (9th Cir. 1959) 13

Canizzo v. Farrell Lines, Inc., 579 F.2d 682 (2d Cir. 1978), *cert. denied*, 439 U.S. 929 (1978) 26

Gates v. Beauregard Electric Cooperative, Inc., 328 So. 2d 367 (La. 1976), *cert. denied*, 429 U.S. 833 (1976)..34

Chavis v. Finnlines Ltd., 576 F.2d 1072 (4th Cir. 1978)..26

Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979) 24, 26

Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798 (2d Cir. 1978) 26

Croshaw v. Koninklijke Ned Lloyd, B.V. Rifswijk, 398 F. Supp. 1224 (D. Ore. 1975) 24

Davis v. Inca Comp. Naviera, 440 F. Supp. 448 (W.D. Wash. 1977) 21

Dorton v. Darby, 373 F.2d 619 (5th Cir. 1967) 13

Edmonds v. Campagnie Generale Transatlantique, 443 U.S. 256 (1979) 9, 10, 34, 35, 44, 46

Federal Marine Terminals Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969) 34

Page

Gallardo v. Westfal-Larsen & Co. A/S.,
435 F. Supp. 484 (N.D. Cal. 1977) 28, 32, 38

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1949)..23

Gay v. Ocean Transport & Trading Ltd.,
546 F.2d 1233 (5th Cir. 1977) 25, 27, 31

Gerrity v. Kate Cann, 2 F. 241 (D.N.Y. 1880) 9

Griffith v. Wheeling-Pittsburgh Steel Corp.,
610 F.2d 116 (3d Cir. 1979) 32, 33, 34, 35

Gutierrez v. Waterman Steamship Corp.,
373 U.S. 206, *reh. den.*, 374 U.S. 858 (1963)..... 11

Hartzog v. Head Line Co.,
358 F.2d 916 (N.D. Ill. 1973) 13

Hess v. Upper Mississippi Towing Corp.,
559 F.2d 1030 (5th Cir. 1977) 37

In re Dearborn Marine Service, Inc., 499 F.2d 263 (5th Cir. 1974), *pet. for rehearing den.*, 512 F.2d 1061....20-21

International Stevedoring Co. v. Haverty,
272 U.S. 50, 47 S. Ct. 19 (1926) 34

Johnson v. A/S Ivarans Rederi A/S,
613 F.2d 334 (1st Cir. 1980) 9, 10-11, 32, 33

Kermarec v. Compagnie Generale Transatlantique,
358 U.S. 625 (1959) 7, 33, 48

Landon v. Lief Hoegh & Co.,
521 F.2d 756 (2d Cir. 1975) 35, 38

Leaf v. United States, 588 F.2d 733 (9th Cir. 1978)..... 13

Leathers v. Blessing, 105 U.S. 626 (1882) 9

Lopez v. A/S D/S Svendborg,
581 F.2d 319 (2d Cir. 1978) 26, 35

Lurbrano v. Royal Netherlands,
572 F.2d 364 (2d Cir. 1978) 26

Marant v. Farrell Lines, 550 F.2d 142 (3d Cir. 1977) .. 35

Matthews v. Ernest Russ S.S. Co.,
603 F.2d 676 (7th Cir. 1979) 26

Page

Miller Adm. v. Union Pacific R.R., 290 U.S. 227 (1933).. 36

Migut v. Hyman-Michaels Co.,
571 F.2d 352 (6th Cir. 1978) 37

Mitchell v. Trawler Racer, 362 U.S. 539 (1960) 11

Mounsey v. Ellard,
363 Mass. 693, 297 N.E.2d 43 (Mass. 1973) 34

Napoli v. Hellenic Lines, Ltd.,
536 F.2d 505 (2d Cir. 1976) 21, 25, 26, 37

O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977) 34

Poller v. Columbia Broadcasting Systems,
368 U.S. 464 (1962) 13

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1954) 9, 23

Ramirez v. Toko Kaium K.K.,
385 F. Supp. 644 (N.D. Cal. 1974) 24, 27

Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97,
443 P.2d 561 (1968) 34

Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,
350 U.S. 124 (1956) 9, 41

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 8

Shapiro v. Glekel, 380 F. Supp. 1053 (S.D.N.Y. 1974) .. 13

Shepler v. Weyerhaeuser Company,
279 Or. 477, 569 P.2d 1040 (Or. 1977), *cert. denied*,
434 U.S. 1051 .....32, 33, 37

Slaughter v. Ronde, 390 F. Supp. 637 (S.D. Ga. 1974),
aff'd per curiam, 509 F.2d 973 (5th Cir. 1975) 37

Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939).. 23

Solsvik v. Maremar Compania Naviera, S.A.,
399 F. Supp. 712 (W.D. Wash. (1975) 37

Spinks v. Chevron Oil Co.,
507 F.2d 216 (5th Cir. 1975) 21, 36

The Max Morris, 137 U.S. 1 (1890) 9, 23

United States v. Diebold, Inc., 369 U.S. 654 (1962) 13

Page

United States v. Dollar,
196 F.2d 551 (9th Cir. 1952) 13

United States v. Perry,
431 F.2d 1020 (9th Cir. 1970) 13

Van Horn v. Gulf Atlantic Towing Corporation,
388 F.2d 636 (4th Cir. 1968) 18, 19, 37

Webb v. City & Borough of Sitka,
561 P.2d 731 (Alas. 1977) 34

West v. United States, 361 U.S. 118 (1959) 37

White v. United States, 400 F.2d 74 (4th Cir. 1968) 37

Wiles v. Delta Steamship Lines,
1976 A.M.C., 2646 (E.D. La. 1976) 30

Statutes

29 C.F.R. § 1918.2(b) 45

29 C.F.R. § 1915.1(d) 45

29 C.F.R. § 1918.53(c)(2) 16, 28

33 U.S.C. § 902(3)(4) 8

33 U.S.C. § 905(b) .....i, 1-2, 3, 9, 23
et. seq.

33 U.S.C. § 933 42

33 U.S.C. § 933(a) 2, 9

33 U.S.C. § 933(i) 2

Annotations and Textbooks

32 A.L.R. 3d 508 (1970) 34

57 Am. Jur. 2d § 176 (2d ed. 1971) 36

1A, Benedict on Admiralty §§ 111, 112 (6th ed. Jhirad, 1979) 9

3 E. Devitt and C. Blackmar, Federal Jury Practice and Instructions, § 80.19 (2d Ed. 1977) 36

Fleming, The Law of Torts, 111 (3d ed. 1965) 33

Page

Gilmore and Black, The Law of Admiralty, 436 (2d ed. 1975) 8

28 Hastings L.J. 771 (1977) 39, 40

7 Journal of Maritime Law and Commerce 447 (1976).. 22

2A A. Larson, The Law of Workmen's Compensation § 71 (1976) 8

2A A. Larson, The Law of Workmen's Compensation § 75.22 (1976) 46

W. Prosser, Handbook of the Law of Torts, §§ 32, p. 151 (4th ed. 1971) 33, 36, 43

Restatement (Second) of Torts § 343 (1965)..3, 22, 24, 25, 26 *et. seq.*

Restatement (Second) of Torts § 343(A) ....3, 22, 24, 25, 26 *et. seq.*

4 The Mar. Law. 305 (1979) 26

6 Washington Practice, Washington Pattern Jury Instructions, Civil (1967), W.P.I. 15.01 36

Other Authority

Fed. R. Civ. P. 56 13

H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698-4705 10

H.R. Rep. No. 2448, 96th Cong., 2 CCH Cong. Index (1980) 48

S. Rep. No. 92-1125, 92nd Cong., 2d Sess., pp. 8-12 10

S. Rep. No. 1511, 96th Cong., 1 CCH Cong. Index (1980) 48

IN THE

Supreme Court of the United States

October Term, 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

v.

LAURO DE LOS SANTOS AND SEATTLE STEVEDORE CO.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT, LAURO DE LOS SANTOS

I.

APPLICABLE STATUTES

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b) (1976):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party, in accordance with the provisions of Section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such

action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. §933(a) (1976):

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

33 U.S.C. §933(i) (1976):

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ; *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer.

II.

STATEMENT OF THE CASE

A. Nature of the Case

This is a personal injury case brought by a longshoreman, in the United States District Court of the Western District of Washington with a demand for trial by jury. Based upon the evidence disclosed in the depositions, the attorney for the defendant moved for summary judgment. Briefs were submitted by both parties.

On September 1, 1976, the Honorable Walter T. McGovern signed an order granting summary judgment of dismissal. Santos filed a timely notice of appeal.

The order and opinion of the district court are not officially reported but are found at 1976 A.M.C. 2583 and are set forth in appendix pages A-1 through A-6 of the Petition for Writ of Certiorari.

The United States Court of Appeals for the Ninth Circuit reversed the judgment and remanded the case for further proceedings on May 1, 1979. The opinion of the court is reported at 598 F.2d 480 and is set forth in appendix B-1 through B-23 of the Petition for Writ of Certiorari. The shipowner petitioned for rehearing and the court of appeals denied the petition in a *per curiam* opinion which was not officially reported, but is set out in appendix C-1 through C-3 of the Petition For Writ of Certiorari.

The appellate court ruled that: (1) the district court's dismissal of the Santos claim misdefined the negligence standard under §905(b); (2) the district court relied upon §343 and §343A, Restatement (Second) of Torts (1965) which embrace the forbidden concepts of assumption of risk and contributory negligence; (3) the district court had inappropriately decided reasonably disputable factual issues against Santos.

B. Statement of Facts

The plaintiff, Santos, was severely injured on December 10, 1972, while working as a longshoreman aboard the vessel M/S JALARATNA. Certain of the facts involved in the case are not in dispute as indicated by the "admitted facts" section of the pre-trial order (JA 10, 11). Those facts are as follows:

On December 10, 1972, Santos was employed as a longshoreman by Seattle Stevedoring Company aboard the ves-

sel M/S JALARATNA. The vessel was moored at the Fisher Flour Mills' dock in Seattle, engaged in loading sacks of bulgar wheat for the far east. The defendant, Scindia Steam Navigation Co., Ltd., of Bombay, India, was the owner of the vessel M/S JALARATNA.

Santos worked as a longshoreman on the night shift in the No. 3 hatch, commencing at 7:00 p.m., on December 10, 1972, and was engaged in stowing the sacks of bulgar wheat being brought in by the ship's winch. He worked continuously in the No. 3 hatch from 7:00 p.m., until the injury at 8:45 p.m.

A short time prior to the accident, a pallet board containing about seventy 50-lb. sacks of wheat was lowered into the No. 3 hatch and struck the pallet jack. About half the sacks were spilled into the hatch.

Following the spilling of the sacks from the pallet board, the balance of the load was lifted by the winch driver upon the instructions of the hatch tender. The load was raised about fifteen feet to the coaming of the hatch and held there while Santos and his fellow worker were engaged in cleaning up the spilled sacks from the deck of the hatch. After about ten minutes, while Santos and his fellow worker were still engaged in cleaning up the spilled sacks of wheat, several more sacks fell from the raised pallet board. The sacks fell into the No. 3 hatch, striking plaintiff and injuring him.

The remaining facts of the case are contained in the deposition testimony of the winch driver, Lester Hawran, the hatch tender, Alvin Botler, and Mr. Santos. Mr. Santos was working in the hold of the ship stowing the sacks. On December 10, Mr. Botler was the hatch tender (R. Hawran Dep. 9). As the winch driver lowered the load into the hatch, he received a signal from the hatch tender to stop the load, but the winch did not stop the load when the controls were put in the stop position. The load hit the

pallet jack and spilled many of the sacks from the pallet board (R. Hawran Dep. 12). The winch had been failing to hold and/or stop the loads during the work shifts on December 8th, 9th and 10th. The winch driver had complained to his foreman that the brakes on the winches were not holding (R. Hawran Dep. 6, 12, 17, 27, 30, 57).

After the sacks had spilled, the hatch tender signaled the winch driver to pick up the load and to hold it twelve to fifteen feet above the bottom of the hold (R. Hawran Dep. 13; Botler Dep. 37, 38). The load was held in that position so that Mr. Santos and his partner could clear away the sacks which had fallen. The runway had to be cleared before the remainder of the load could be landed (R. Hawran Dep. 14, 44, 45; Botler Dep. 11, 12, 40). Santos and his partner were doing their job cleaning up the spilled sacks at the time the other sacks fell and injured Santos (R. Hawran Dep. 40; Botler Dep. 59). As the winch held the partial load in the air, and Santos and his partner worked to clean up the landing area, additional sacks worked loose because of the creeping and slipping of the winch (R. Hawran Dep. 58, 59).

Santos and his partner had worked eight to ten minutes while the partial load was suspended. During that time the partial load had crept down and was raised three or four times during the clean-up procedure. The additional sacks worked loose because of the creeping and slipping of the winch and the need to adjust the load by raising it after it had slipped (R. Hawran Dep. 57, 59). The brakes did not hold the load and caused the additional sacks to fall (R. Hawran Dep. 16).

The hatch tender, Botler, testified that December 10th was his first work shift aboard the vessel. He replaced the hatch tender who had worked the previous two evenings (R. Hawran Dep. 4, 5). Mr. Botler was not aware that there had been earlier difficulties with the winches. He could see that Hawran was having some difficulty, but

did not know that the brakes were faulty at the time (R. Botler Dep. 7, 8). After the accident when Botler was driving the winches, he noticed that the brakes did not stop when the winches were cut off (R. Botler Dep. 7, 8, 12). After the initial spill, Botler signaled the winch driver to hold the load twelve to fifteen feet in the air while the men in the hold cleaned up. The hatch tender believed there was only one way to clear the area and that was to pick the load up and hold it there. Suddenly, he noticed the remaining sacks start to slide and fall upon the plantiff working below (R. Botler Dep. 10). He yelled a warning, but it was too late (R. Botler Dep. 42, 43). One sack hit the plaintiff in the back of the neck and two others also struck him (R. Botler Dep. 10).

Mr. Santos testified that after the first half of the load was spilled, when the load hit the pallet jack, he knew it was his duty to clean up the spilled sacks (R. Santos Dep. 41, 42, 45, 57 and 58).

The winch driver, Hawran, testified that the M/S JALARATNA was the only ship that he had ever worked on in the eighteen years he had been a longshoreman that positioned the winch controls so high and way up near the "cross tree" (R. Hawran Dep. 3, 6). The electric winches were part of the ship (R. Hawran Dep. 8, 17, 24), and on the Indian ships the winches were generally bad (R. Hawran Dep. 6, 18, 20, 21). The platform upon which the winch driver was operating the winches was in the cross tree of the ship more than twenty-five feet above the deck (R. Hawran Dep. 18; Botler Dep. 24). He could not see the hatch or the area where the men were working (R. Hawran Dep. 31, 32). He, therefore, had to rely on the hatch tender for signals to stop the load as it was lowered into the hold (R. Hawran Dep. 9, 33). Botler testified that he believed this was the only ship that had the winches set in the crow's nest. Most other ships had the winch controls positioned so that the winch driver

could see what was going on (R. Botler Dep. 11, 12, 21, 22, 24).

When Hawran went to work on December 8, he complained to his foreman that the brakes were not holding on the winches and was told that the "day shift was complaining and they just can't seem to do anything with them." (R. Hawran Dep. 6).

The sacks that were left on the pallet board after the initial spill looked like they were going to stay where they were (R. Botler Dep. 47). It was Botler's best judgment that the load should be picked up and held while Santos and his partner worked to clean up the mess (R. Botler Dep. 48, 50). After the load was picked up and held, Botler inspected it and it appeared to be fine. It did not appear to be dangerous (R. Botler Dep. 52). If he hadn't felt the load was safe, he wouldn't have had it held there (R. Botler Dep. 14).

III.

SUMMARY OF ARGUMENT

Although shipowners asked for immunity from all third-party liability, Congress, in passing the 1972 amendments chose to abolish the unseaworthiness cause of action only, but chose to preserve for longshoremen the negligence cause of action against shipowners. The maritime prohibitions against assumption of risk and contributory negligence defenses were also reaffirmed. The circuit court reversed the district court in this case because of its use of the prohibited defenses and because the Court inappropriately made "findings of fact" on a motion for summary judgment. The rule adopted by the circuit court in this case is consistent with the several congressional goals expressed in the congressional reports, is faithful to traditional negligence concepts and is patterned on this Court's decision in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

IV.

ARGUMENT

A. Background — Negligence Action Retained

The Longshoremen's and Harbor Workers' Compensation Act (hereinafter, the Act) set up a compensation system which insulated the employer (the Stevedore Company, 33 U.S.C. §902 (3)(4) (1976)) from liability in exchange for compensation benefits. Since its inception, the Act has made no attempt at insulating any other entities or parties from liability for damages. On the contrary, it has preserved the right to sue any other negligent parties. Thus, the Act is quite similar to many other compensation Acts, particularly the state workmen's compensation acts. In most, if not all of these acts, the right of an injured workman to sue a negligent third party is preserved. 2A A. Larson, The Law of Workmen's Compensation §71, p.14-1 (1976). Typically, the system that has arisen around third-party actions provides that after the worker receives compensation through the particular compensation act, he must repay the compensation program the amount received in medical payments, time loss payments, and disability benefits from the proceeds of any third-party recovery. The Act made the compensation remedy exclusive against the injured worker's employer, but preserved the worker's right to bring a tort action against any other liable entity. Gilmore and Black, The Law of Admiralty, 436 (2d ed. 1975).

As this honorable Court well-knows, the case law development of longshoremen's third-party rights expanded out of the pure negligence areas and into the "warranty of seaworthiness" protection which had formerly been afforded only to seamen. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The 1972 amendments to the Act abolished the unseaworthiness remedy recognized in *Sieracki*. The amendments eliminated any action for indemnity by the shipowner against the stevedore company as

recognized in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). The amendments limited the longshoreman's right of action against the shipowner to one based on negligence. 33 U.S.C. §905(b); *Bloomer v. Liberty Mutual Insurance Co.*, 100 S. Ct. 925 (1980); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). From its inception, the 1927 Act provided for suit against any other person or entity "liable in damages," 33 U.S.C. §933(a). That section was not altered by the 1972 amendments, but the scope of the longshoremen's right to sue a third party was restricted with reference to the shipowner by §905(b) to injuries caused by the "negligence" of the shipowner or vessel.

33 U.S.C. §905(b) simply abolished the unseaworthiness remedy, eliminated the indemnification action by the shipowner against the stevedore and limited the longshoreman's action against the shipowner to one based on negligence. *Bloomer; Edmonds.* The history of third-party negligence actions in longshore personal injury cases was so well-established at the time of the 1972 amendments that the language concerning the negligence of the ship or shipowner did not create a new cause of action, but simply preserved and retained the negligence cause of action against the ship and shipowner as it had been known in the case law long before the 1972 amendments. *Edmonds; Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *The Max Morris*, 137 U.S. 1 (1890); *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334 (1st Cir. 1980); *Brown v. Ivarans Rederi A/S*, 545 F.2d 854 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977); *Leathers v. Blessing*, 105 U.S. 626 (1882); *Gerrity v. Kate Cann*, 2 F. 241 (D.N.Y. 1880); 1A, Benedict on Admiralty §§111, 112 (6th ed. Jhirad, 1979).

At the time of the 1972 amendments to the Act, Congress was faced with a large body of case law dealing with the rights of longshoremen vis-a-vis the shipowner as a

result of the shipowner's negligence. A second large body of case law existed which dealt with a longshoreman's rights vis-a-vis a shipowner, as a result of the unseaworthiness of the shipowner's vessel. Congress was aware of both bodies of existing case law at the time of the amendments to the Act. Congress understood the law as it existed at the time of the amendments and specifically intended to change only those rules of maritime law that it clearly addressed. Congress clearly intended to continue the rules of maritime law that it chose not to change. *Edmonds,* 443 U.S. at 272, 273. The complete Senate Report pertinent to the issues presented in this case is attached hereto as Appendix I.[1]

Congress intended to "retain" and "continue" the long familiar negligence action, but simply chose to abolish the unseaworthiness action. The committee reports state that "persons to whom compensation is payable under the Act *retain the right to recover damages for negligence against the vessel,* but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness." (Emphasis added) Appendix I-10.

The Senate Report states at 5:

> The bill reported by the committee meets these objectives by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of unseaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. It *continues to allow suits against vessels or other third parties for negligence.*

(Emphasis added) Appendix I-6. The court in *Johnson v. A/S Ivarans Rederi, supra,* at 613 F.2d 339, observed that

---

1. The House Report No. 92-1441, 92nd Cong., 2d Sess., (1972), reprinted in 1972 U.S. Code Cong., and Admin. News 4698-4705 is identical to the Senate Report No. 92-1125, 92d Cong., 2d Sess., pp. 8-12 in its discussion of the elimination of the unseaworthiness remedy and the retention of the negligance action against the shipowner.

the legislative history "strongly implies that Congress believed the 1972 amendments continued rather than created a duty on the part of the vessel to maintain a safe place to work."

Congress was aware of the rule that there was a "complete divorcement of unseaworthiness liability from concepts of negligence." *Mitchell v. Trawler Racer,* 362 U.S. 539, 550 (1960). The negligence cause of action was discussed by this Court in the case of *Gutierrez v. Waterman Steamship Corp.,* 373 U.S. 206, 210, *reh. den.,* 374 U.S. 858 (1963). The shipowner was found negligent in allowing beans to be unloaded in defective bagging which caused the beans to spill out of the broken bags throughout the unloading process.

The discussions, both in the majority and dissenting opinions, in the *Gutierrez* case, point up the clear distinction between concepts of unseaworthiness and those of negligence. In the unseaworthiness action, the knowledge of the shipowner was irrelevant. His opportunity to discover and correct the defective and dangerous condition, was irrelevant. In the negligence action, the question was whether the shipowner knew or should have known of the defective condition of the bags being unloaded. In the case at bar, the question is whether the shipowner knew or should have known of the defective and slipping winch, and whether the shipowner knew or should have known of the dangers attendant upon placement of a winch driver so high above the deck that he could not see the loading operation.

That Congress clearly understood the distinction between negligence and unseaworthiness is demonstrated in the committee reports:

> For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages

> for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it.

Appendix I-8. The reports continued.

> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully of [sic] negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Appendix I-10.

The quotations above demonstrate that Congress knew and appreciated the difference between negligence and unseaworthiness and intended that the negligence action be retained but that the unseaworthiness cause of action be abolished.

B. Summary Judgment Inappropriate

Santos alleged that the shipowner was negligent and careless:

(1) In failing to provide Santos with a safe place to work aboard the vessel M/S JALARATNA;

(2) In providing the longshoremen with a faulty and malfunctioning winch;

(3) In failing to have the faulty winch repaired prior to the time of the accident.

The district court held there was no material question of fact to be decided by a jury and granted the shipowner's motion for summary judgment. The circuit court reversed because the district court had decided reasonably disputable factual issues against Santos.

On a motion for summary judgment, all of the facts surrounding the allegations of negligence must be viewed in a light most favorable to the non-moving party, Santos. It is only where there is no material question of fact that a motion for summary judgment pursuant to Fed. R. Civ. P. 56 can be granted. *Poller v. Columbia Broadcasting Systems,* 368 U.S. 464, 467 (1962); *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962).

Not only are the facts viewed in a light most favorable to the non-moving party but all reasonable inferences to be drawn from the facts are to be so viewed. If the evidence presented on the motion for summary judgment is subject to conflicting interpretations or if reasonable men might differ as to its significance, summary judgment is improper. *United States v. Perry,* 431 F.2d 1020 (9th Cir. 1970); *Cameron v. Vancouver Plywood Corp.,* 266 F.2d 535 (9th Cir. 1959); *United States v. Dollar,* 196 F.2d 551 (9th Cir. 1952). Furthermore, the question of whether the shipowner acted as a reasonably prudent and careful shipowner under the circumstances existing at the time of plaintiff's injury is a jury question. The reasonable man standard is within the special competence of the jury and, therefore, the issues of negligence, contributory negligence and proximate cause cannot ordinarily be determined on a motion for summary judgment. *Leaf v. United States,* 588 F.2d 733 (9th Cir. 1978); *Arney v. United States,* 479 F.2d 653 (9th Cir. 1973); *Dorton v. Darby,* 373 F.2d 619 (5th Cir. 1967); *Shapiro v. Glekel,* 380 F. Supp. 1053 (S.D.N.Y. 1974); *Hartzog v. Head Line Co.,* 358 F.2d 916 (N.D. Ill. 1973).

The district court granted the motion for summary judgment only after resolving several disputed facts against Santos. It is respectfully submitted that the district court subverted the jury's function by weighing the evidence, by making factual "findings," by deciding questions of negligence, contributory negligence, and proximate cause,

when reasonable minds could differ. For example, the district court made the following "findings" of fact which were crucial to any standard of negligence:

1. The shipowner did not know the ship's gear was defective.[2]

2. The shipowner should not reasonably have been expected to know the gear was defective.[2]

3. Exclusive control of the gear was exercised by the stevedores during the relevant time period.[2]

4. The premises were in the exclusive control of the stevedores during the loading operations.[2]

5. No one from the ship's crew was ever informed of the winch's condition prior to the accident.[2]

6. The initial spillage of sacks was caused by the pallet striking the pallet jack.[2]

7. Following the initial spillage, the pallet was raised fifteen feet overhead by the winch driver and left to swing overhead.[2]

8. The jumpiness of the winch was open and obvious to the plaintiff.[3]

9. The plaintiff's activities were so dangerous that he cannot recover against the shipowner.[4]

10. Plaintiff recognized that the circumstances were so dangerous that he cannot recover.[4]

These examples are surely findings of fact. Certainly, reasonable minds could differ on these "facts." In "findings of fact" 1 and 2, a jury could have found, for example, based on the depositions, that the shipowner, in fact, did know that the gear was defective. There is uncontradicted evidence that the winch had been malfunctioning for two

---

2. Appendix A, Petition for Writ of Certiorari, p. A-4, District Court's Memorandum and Order Granting Summary Judgment of Dismissal.

3. *Id.* at A-5.

4. *Id.* at A-5, A-6.

and one-half days prior to the day of the accident and that during that time the representatives of the shipowner were back and forth in the vicinity of the loading operation. (R. Hawran Dep. 60; Botler Dep. 53). A jury could have found that the winch had been malfunctioning for two full days prior to the accident and that this length of time was adequate (contrary to the district court's "findings") for a reasonably prudent shipowner to discover and correct the defect. A jury could have found that, in the words of Hawran, "the day shift was complaining [about the winches] and they [the shipowner] just can't seem to do anything with them." R. Hawran Dep. 6).[5]

In "findings of fact" 3 and 4, the district court found that the premises were in the exclusive control of the stevedores during the relevant time period. The court found that there was no dispute on that question. There is, in fact, a very serious dispute as to exactly what control was within the power of the stevedores and what remained in the shipowner. The defective winch belonged to the shipowner as an integral part of the ship itself.

---

5. Similarly, in "finding of fact" 5, the district court "found" that the ship's crew was never informed of the winch's condition prior to the accident and that the ship's crew did not know of the winch's condition prior to the accident. This is a pure "finding of fact." Such "fact finding" is beyond the power of the district court on a motion for summary judgment. In the instant case, the shipowner has come forward with no evidence in affidavit form or otherwise to indicate what its state of knowledge was prior to the Santos injury. The shipowner has come forward with no evidence indicating what the state of repair of the winch was. The shipowner chose to stand mute. The district court mistakenly placed upon Santos the onus of the shipowner's failure to come forward with any evidence. The court inappropriately viewed the facts and inferences in a light most favorable to the shipowner.

A fact finder could infer that the shipowner had actually been informed about the winch's condition prior to the accident (R. Hawran Dep. 6, 17).

Neither the plaintiff, Santos, nor any of the other longshoremen had any authority to take it upon themselves to repair the winch. 29 C.F.R. §1918.53(c)(2) probihits the stevedore from adjusting or repairing the electric control circuits of the winches. Repair of the winch in any respect was not within the province of the longshoremen or their employer.

Paragraph 7 of the "admitted facts" portion of the pretrial order (J.A. 11) states that the Seattle Stevedore Company was "in control of the loading." This fact is far from an admission that the "control of the premises" or the "control of the gear" was exclusively in the stevedores. Such a "finding" is absolutely unsupported by any evidence in this record. A fact finder would have the right to find that the shipowner maintained ultimate control over the ship and its gear, and the amount of control the longshoremen had in conducting their operations was extremely limited. It did not extend to the repair of the ship's gear or the alteration of the ship's gear in any way that would have been necessary to correct a slipping, defective ship's winch. A jury could find that plaintiff, Santos, had no control over the premises or gear. The evidence is uncontradicted that Santos was a "hold" man who worked at the bottom of the hierarchy of command or control of the ship in the loading operation. The "relevant time period" determination was a jury question.

In "finding of fact" 6, the district court "found" that the initial spillage was caused by the pallet striking the pallet jack, when the evidence is uncontradicted that the initial problem was caused by the winch failing to stop the load even though it was in an "off" position (R. Hawran Dep.

12, 13); Botler Dep. 9, 10). The district court's "finding" implies strongly that there was either nothing wrong with the winch or that the cause of the initial spillage was negligence of the winch driver when there was evidence that the spillage was caused by the defective brakes on the winch. The weighing of evidence on the question of cause was a jury function.

In "finding of fact" 7, the district court "found" that the partially spilled pallet was raised fifteen feet overhead by the winch driver and left to "swing" overhead. There is a significant dispute in the evidence concerning the exact amount of movement, if any, the pallet underwent immediately prior to the accident.[6]

In "findings of fact" 8, 9, and 10, the district court "found" the load's position as "dangerous." The amount

---

6. The persons in the best position to see the load testified there was little, if any, movement (R. Hawran Dep. 42; Botler Dep. 39). The amount of swinging is significant because Santos claimed that the remaining sacks of wheat did not loosen because the pallet swung back and forth, but because the winch continued to be defective in its braking mechanism and allowed the pallet to creep down, requiring the winch driver to keep moving the pallet back up to its desired height and thus causing additional sacks to work loose. It is also most important because the evidence concerning the personal knowledge of Santos as to exactly what danger he faced, is subject to inference. Thus, it is arguable that the only knowledge that Santos had concerning the malfunctioning winch prior to his accident and his only knowledge concerning "danger" was limited to some appreciation that the winch driver was having trouble landing the loads because of jerkiness of the winch, but that his knowledge did not include the fact that the brakes on the winch were not holding the loads. It is further inferable that his appreciation of the danger he faced was simply that of the danger of a longshoreman in working in areas in which loads were coming in from above, a situation hardly unusual for a "hold" man who worked under loads constantly. The crucial finding of danger is necessarily dependent upon a weighing of the testimony and a drawing of inferences. These were all jury questions. Santos had no appreciation that the load was slipping as he worked to clean up the spill nor did he know that the brakes were not holding on the winches.

of danger is a crucial "finding." It should have been left to the jury.[7] There is considerable conflict between what the district court "found" to be obvious facts and what the persons on the scene felt to be the case. The hatch tender believed that the method of operation which he adopted was the proper one under all the circumstances existing at the time and immediately prior to the accident. He did not discuss this with Mr. Santos, he merely went forward in the same way that was generally accepted procedure. Whether Santos acted prudently under the circumstances existing in the hold of the vessel just before his accident, considering his position in the hierarchy of command, was a question of fact for the jury. In the case of *Van Horn v. Gulf Atlantic Towing Corporation,* 388 F.2d 636, 639, (4th Cir. 1968), the court said at 639:

---

7. The hatch tender testified concerning the danger as he saw it (R. Botler Dep. 47, line 7):

Q. How did this pallet load look after it was raised back up? Can you describe how the sacks appeared on the pallet then?

A. The ones that were on there looked like they were going to stay where they were unless somebody took them off.

Botler continued to testify at page 52:

Q. Okay, thank you. Is there some reason it was less dangerous to Mr. Santos in the hold being suspended up ten or twelve feet?

A. It didn't seem like it was dangerous to me at all.

Q. Even though half had spilled and it wasn't square and balanced, right. The tie rope had come off. It just didn't seem dangerous to you?

A. After I picked the load, like I said, I surveyed it and we looked at it and everything seemed fine, so we held it there.

The question of the amount of danger existing as the load was held twelve to fifteen feet above Santos, and his fellow workmen, is crucial to any resolution of the case. It is a factual question for the jury. The winch driver testified at page 55 of his deposition, in response to a question as to whether it was dangerous to work under the suspended load, as follows:

> I wouldn't say that, I won't say it is unsafe for the men to be picking up the sacks when I was picking the load up, keeping the load visually where I could see fifteen feet, roughly, above their heads.

Additional testimony concerning the amount of danger and the perception of the workmen is contained at R. Hawran Dep. 56; R. Botler Dep. 14, 37 and 50.

> Whether due care under all the circumstances was observed by the present shipowner at the relevant times and to what proportionate extent, if any, Van Horn was at fault are clearly questions for jury determination after a full trial. See *Pope & Talbot v. Hawn,* 346 U.S. 406, 74 S. Ct. 202, 98 L.Ed. 143 (1953). As the noted admiralty text authors, Gilmore and Black, observe regarding negligence under the Jones Act [i]t would be a rare court in an unusual case which would take the negligence issue away from the jury. . . ." Gilmore and Black, *The Law of Admiralty,* 311 (1957). The same principle should be applicable under the general maritime concept of negligence. As a result, we hold that the lower court erred in taking this case from the jury and deciding as a matter of law that Gatco was not negligent.
> We therefore remand the case for trial on the negligence and contributory negligence issues, while affirming the district court's action on the unseaworthiness claim.

Santos testified that he believed it was his duty to clean up the spill and once he set upon cleaning it up he was in no position to watch the load over his head (R. Santos Dep. 41, 42, 43, 50). At page 60 of his deposition, Santos testified that the only problem he knew about with the gear was that it was "jumpy." It was only later, and after the accident, that he found out from the winch driver that the brake on the winch was slipping and would not hold the load (R. Santos Dep. 62).

A jury should have been allowed to find precisely what Santos knew about his situation in the hold as he was cleaning up the sacks of flour and precisely what appreciation he had of the amount of danger that confronted him. Whether Santos had a reasonable alternative to his clean-up activities was a jury question. A jury should have been permitted to find whether the jumpiness of the winch had any part to play in this accident. A jury should have been permitted to find whether the defective brakes which allowed the winch to slip when in the stop position had

any part to play in his accident.[8]

The district court found that the "alleged defective condition of the winch had only a remote cause-in-fact relationship to the accident and could not have been the proximate cause of the accident."[9]

Typically, the questions of negligence, contributory negligence, and proximate cause are jury questions. The "finding" of lack of proximate cause by the district court is surprising when one examines portions of the testimony which indicate that the load, as it was held, appeared to be stable, but it was only the brake failing to hold that caused the load to loosen and slip and fall upon the plaintiff. A winch with proper brakes would not have allowed the load to slip. (R. Hawran Dep. 12, 13, 16, 17). The district court's "finding" on proximate cause seemed to be based on the court's feeling that the stevedores' negligence intervened and cut off any negligence of the shipowner.

The Fifth Circuit was faced with the same type of proximate cause argument in *In the Matter of the Complaint of Dearborn Marine Service, Inc., et al., For Exoneration From or Limitation of Liability of the Oil Screw Carryback*, 499 F.2d 263, 279 (5th Cir. 1974), *pet. for rehearing den.*, 512 F.2d 1061. The court said at 279:

> We also reject Dearborn's contention that *Carryback*, by being moored too close to the platform, merely created a condition on which intervening neg-

8. The evidence was clear that it was the slipping of the brake on the winch that caused the sacks to fall on the plaintiff, not the jumpiness of the winch. The jumpiness of the winch was significant only in the hatch tender's decision as to whether the load would be taken out to the dock and then returned to the hold after the mess had been cleaned up. A jury could find that the jumpiness of the winch was not the proximate cause of Santos' injury. A jury could find that under the circumstances existing in the hold of the ship, Santos was not in any degree responsible for his own accident. These and other questions which could be hypothesized are classical (fact) jury questions.

9. Appendix A, Petition for Writ of Certiorari, p. A-6, District Court's Memorandum and Order Granting Summary Judgment of Dismissal.

ligence forces of others acted and was not itself a proximate cause of the deaths in issue. This theory of proximate causation, now almost universally rejected, in admiralty as elsewhere, is an argument "grow[ing] out of the discredited notion that only the last wrongful act can be a cause—a notion as faulty in logic as it is wanting in fairness." *In re Kinsman Transit Co.*, 338 F.2d 708, 719 (CA 2 1964), *cert. den. sub nom. Continental Grain Co. v. City of Buffalo*, 380 U.S. 944, 85 S.Ct. 1026, 13 L. Ed. 2d 963 (1965). The correct rule is that actionable negligence may consist of failure to take precautions against forseeable acts of third persons, and this rule applies though the conduct of the third person is itself negligent. Restatement 2d, Torts §§ 302, 302A; *Transcontinental Gas Pipe Line Corp. v. Mobil Drilling Barge*, 424 F.2d 684, 689 (CA 5), *cert. den. sub nom. Ocean Drilling & Exp. Co. v. Signal Oil and Gas Co.*, 400 U.S. 832, 91 S.Ct. 65, 27 L.Ed.2d 64 (1970); *Horton & Horton, Inc. v. T/S J. E. Dyer*, 428 F.2d 1131 (CA 5., 1970), *cert. denied*, 400 U.S. 993, 91 S. Ct. 461, 27 L.Ed.2d 441 (1971); Harper & James, *Law of Torts* §20.05, at 1144 n. 34 (1956). *See also* Restatement 2d, Torts §449.

The conclusion that Dearborn was negligent must be affirmed.

Proximate cause is not destroyed merely because plaintiff may also have contributed to his own injury. *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 221 (5th Cir. 1975).

If Santos were found by a jury to have been guilty of some negligence, a jury could also have found that the failure of the shipowner to take precautions (by repairing the winch) against foreseeable acts of third persons was negligence. Santos' only real alternative to doing his job as he did, assuming he had enough knowledge to make such a decision, may have been refusal to continue, with all of its repercussions. *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 509 (2d Cir. 1976); *Davis v. Inca Comp. Naviera*, 440 F. Supp. 448, 452 (W.D. Wash. 1977). Thus, how much negligence, if any, was Santos' responsibility should have been submitted to the jury.

C. The 1972 Amendments to the Longshoremen's and Harbor Workers Compensation Act Have Not Substituted Assumption of Risk and Contributory Negligence Principles for Comparative Negligence Principles

The district court found that "the manner in which the accident occurred, the fact that plaintiff's activities were so dangerous and the fact that plaintiff undertook his actions free from any direction by the defendant while recognizing that the circumstances were so dangerous, is such that the defendant cannot be held liable as a matter of law."[10]

Thus, the essential and overwhelming thrust of the Memorandum and Order Granting Summary Judgment was that Santos was fully aware of the specific risk involved in working as he was working at the time of his injury, and that he voluntarily accepted that risk. The words "assumption of the risk" were never used in the district court's decision, but, it is submitted, that there can be no doubt, the court held as a matter of law, that Santos assumed the risk of his own injury. The court seemed to say that the changes in the Act necessitated this result. The appellate court held that the district court was in error in invoking §343 and §343A of the Restatement (Second) of Torts to the extent that they placed limitations on the shipowner's liability inconsistent with Congress' explicit direction to reject the defenses of contributory negligence and assumption of risk.

Clearly, the amendments did not change the maritime rules concerning assumption of risk and comparative negligence.[11] The shipowner, in essence, has argued that Santos may not recover as a matter of law because the faulty

---

10. *Id.* at A-5, A-6.

11. Robertson, Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 7 Journal of Maritime Law and Commerce 447, 474 (1976).

condition of the winch was at all times known to him, that it was open and obvious, and that he voluntarily subjected himself to the risk of injury. The district court essentially adopted that view. The statutory section involved, 33 U.S.C. §905(b), clearly provides that an injury caused by the negligence of a vessel gives rise to a cause of action against the vessel. There is no mention in the amendments of any change which would substitute assumption of the risk principles for the former comparative negligence principles. The law on this subject remains the same as stated by this Court in *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939).

It has been the law for decades that in a trial of a case of maritime tort on navigable waters, the maritime rule of comparative negligence rather than the common law rule of contributory negligence will prevail. *Pope & Talbot, Inc., v. Hawn*, 346 U.S. 406, 409 (1954); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243 (1949); *The Max Morris*, 137 U.S. 1, 14 (1890).

To eliminate any doubt that Congress intended no change in the application of assumption of risk and comparative negligence, the committee reports state:

> Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently at different ports depending on the law of the state in which the port may be located. The Committee intends the legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of federal law. In that connection, *the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply* in cases where the injured employee's own negligence may have contributed to causing the injury. Also, *the Committee intends that the admiralty rule which precludes the defense of*

> *"assumption of risk"* in an action by an injured employee shall also be applicable.

(Emphasis added). Appendix A-12.

The district court erred because it incorporated the substance of the defenses of contributory negligence and assumption of risk as contained in §§343 and 343A. The sections and comments are permeated with the forbidden concepts.[12] Thus, comment e. to §343 states:

> In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, and the activities carried on, and the dangers involved in either, *he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the* land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, *or that he will voluntarily assume the risk of harm* if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

(Emphasis added) *See also,* §343 comments b, d and §343A comment d (Appendix II).

Most courts that adopted §§343 and 343A did not refer to the conflict between the sections and the congressional mandate to exclude defenses of assumption of risk and contributory negligence. *Clemons v. Mitsui O.S.K. Lines, Ltd.,* 596 F.2d 746 (7th Cir. 1979); *Anuszewski v. Dynamic Mariners,* 540 F.2d 757 (4th Cir. 1976); *Croshaw v. Koninklijke Ned Lloyd, B.V. Rijswijk,* 398 F. Supp. 1224 (D. Ore. 1975); *Ramirez v. Toko Kaium K.K.,* 385 F. Supp. 644 (N.D. Cal. 1974).

12. The sections and comments are attached hereto as Appendix II.

Other courts sought to reconcile §§343 and 343A with the congressional mandate by using cautionary language to assure that they were aware of the conflict, *Napoli, supra* at 536 F.2d 508 (2d Cir. 1976); *Gay v. Ocean Transport and Trading Ltd.*, 546 F.2d 1233, 1241 (5th Cir. 1977).

In *Napoli, supra*, the appellate court reversed a jury verdict in favor of the defendant, shipowner, and remanded for a new trial. The court criticized the jury instructions at 536 F.2d 508:

> Moreover, we do not think that instructions which flatly negate the duty to protect against obvious danger properly portray the present-day obligations owed by a landowner to one whom he invites upon his premises. . . .
>
> *Where dangers are unreasonable, their obviousness, standing alone, should not necessarily relieve a defendant of all responsibility for their presence.* Although the invitee (or in this case the employee) may be under a duty to avoid harm likely to result to him from open and obvious dangers, *he may not be in a position fully to appreciate the risk or* to avoid the danger even *though aware of it.* . . .
>
> *Moreover, the traditional rule, while generally phrased in terms of negligence, is really a commingling of the doctrines of negligence, contributory negligence and assumption of risk. Where, as in this case, the doctrine of comparative negligence is observed and assumption of risk is not a defense, the arguments in support of the rule lose much of their cogency.*

(Emphasis added)

In the instant case, the jury could find that Santos was not aware of the precise danger which injured him, that the vessel owner might reasonably anticipate that Santos would do his job despite any obvious danger (if the fact-finder found it obvious) since his only alternative would be to leave his job or face trouble for delaying the work, that any negligence of Santos was only a concurring cause

with the shipowner's negligence and therefore comparative negligence could apply.

Thus, began the attempts by the courts to apply premises liability approaches to a longshoreman's negligence action against a shipowner and, at the same time, to steer clear of assumption of risk and contributory negligence defenses. The courts have been unsuccessful in their attempt. Comments, "Section 905(b) and A Standard of Negligence: Cosmos or Chaos,?" 4 The Mar. Law. 305 (1979), points out the confusion, chaos and irreconcilability of the cases which rely too heavily on §§343 and 343A, and advocates the adoption of the *Santos* standard in all other jurisdictions. The cases from the Second Circuit since *Napoli* demonstrate the confusion and irreconcilability. *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682 (2d Cir. 1978), *cert. denied*, 439 U.S. 929 (1978); *Lurbrano v. Royal Netherlands*, 572 F.2d 364 (2d Cir. 1978); *Cox v. Flota Mercante Grancolombiana*, S.A., 577 F.2d 798 (2d Cir. 1978), *cert. denied*, 439 U.S. 881 (1978); *Lopez v. A/S D/S Svendborg*, 581 F.2d 319 (2d Cir. 1978). In *Lopez*, the court said at 326: "This case also will fall within what seems to be rapidly becoming an overly complex and unpredictable body of law."

The Seventh Circuit steers an uncertain and irreconcilable course in the cases of *Matthews v. Ernest Russ S.S. Co.*, 603 F.2d 676 (7th Cir. 1979) and *Clemons v. Mitsui O.S.K. Lines Ltd.*, 596 F.2d 746 (7th Cir. 1979).

The Fourth Circuit cases of *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976) and *Chavis v. Finnlines Ltd.*, 576 F.2d 1072 (4th Cir. 1978) point up the same irreconcilable conflict between barring a longshoreman from recovery because he exposed himself to an open and obvious danger, on one hand, and allowing the jury to be instructed that a shipowner owed the longshoreman the duty to exercise ordinary care under the circumstances to keep the premises in a reasonably safe

condition for longshoremen working aboard, on the other. The conflict is created by applying premises liability principles to negligence actions while at the same time attempting to keep assumption of risk and contributory negligence from barring recovery.

The court in *Gay, supra,* expressed the same concern concerning assumption of risk and contributory negligence as follows at 546 F.2d 1241:

> *The more telling criticism of the traditional rule, however, is that it is premised in large part upon the concepts of contributory negligence and assumption of risk. As previously recounted both these concepts are inappropriate in §905(b) cases. It would be wholly improper then indirectly to introduce these principles into LHWCA suits by adopting the traditional rule that if a hazard is open and obvious that fact alone absolves the owner of his negligence.*

(Emhasis added)

The Fifth Circuit made it clear in *Gay,* above, that it would not allow "assumption of risk" or "contributory negligence" defenses to enter into longshore personal injury cases under the guise of "open and obvious" danger obviating any duty on the part of the shipowner.

It is submitted that the district court applied assumption of risk to the Santos cause of action in its judgment of dismissal on the motion for summary judgment. The judgment, therefore, was in error. A reasonable fact-finder could conclude that a man in the position of the plaintiff, Lauro De Los Santos, had no realistic or reasonable way of protecting himself against the dangerous, malfunctioning winch. He was merely doing the job he felt was expected of him at the time of his accident. Santos was at the bottom of the chain of work command and had no power to alter the work methods. He had no authority to repair the malfunctioning winch. There was no evidence that Santos had the power or ability to devise a better or safer method of doing the work. Thus, whether

Lauro De Los Santos acted reasonably under the circumstances was a question of fact for the jury under proper instruction. Indeed, 29 C.F.R. §1918.53(c)(2) denies the longshore crew the right to "tamper with or adjust electric control circuits" of electric winches. The shipowner certainly maintained control over the repair of the winches in this case. The observation of the circuit court is thus well-taken that "[f]rom the record before us, it is not at all clear that the shipowner did not maintain ultimate control over the ship and its gear during the loading. Far from concluding that *only* the stevedore could have had the defective winch repaired, we cannot be certain from the record that the stevedore had *any* authority to repair it." *Santos,* 598 F.2d at 490.

The contrast between the decisions of Judge Orrick in the cases of *Ramirez v. Toko Kaium K.K.,* 385 F. Supp. 644 (N.D. Cal. 1974), and *Gallardo v. Westfal-Larsen & Co. A/S.,* 435 F. Supp. 484 (N.D. Cal. 1977) is also instructive. The court discussed the use of §§343 and 343A in *Gallardo, supra,* at page 494:

> No matter whether courts use Sections 343 and 343A alone or together, the *references to rules of real property tort law conflict with the intent of Congress expressed in the House Report.* For example, the *Restatement* sections *force courts to define a shipowner's standard of care under the amendments in terms of the plaintiff's perceptions of the danger posed by a given condition. The sections thus tend to foreclose a balanced inquiry into the reasonableness of a vessel's conduct under the circumstances of a particular case and tend to limit the liability of shipowners for their proven negligence. See, e.g., Anuszewski v. Dynamic Mariners Corp., Panama,* 391 F. Supp. 1143, 1145 (D. Md. 1975). The amendments, of course, permit limitations upon a plaintiff's recovery based upon the admiralty doctrine of comparative negligence. However, *the amendments specifically reject any bar to recovery based upon contributory negligence and assumption of risk.* Yet, the

authors of the *Restatement* clearly indicate that the contributory negligence of the plaintiff and assumption of risk have a direct bearing upon liability under Sections 343 and 343A. *Restatement (Second) of Torts* §343, comment d; *id.* §343A, comment d. The authors also state that whether or not courts conceive of a plaintiff's perceptions of a hazardous condition as relieving a defendant of proven liability or of preventing a finding of liability altogether, the effect of either analysis is the same. *Id.* §496C, comment d. Defendants receive the benefit of a partial or absolute bar to liability having the characteristics of a defense based upon an implied assumption of risk.

The development of a body of precedent which focuses upon the perceptions of the plaintiff has more than theoretical importance. Reported cases already contain examples of plaintiffs who were not permitted to compare their personal negligence against the negligence of their opponents. *See Anuszewski v. Dynamic Mariners Corp. Panama, supra,* 391 F. Supp. at 1145; *Frasca v. Prudential-Grace Lines, Inc., supra,* 394 F. Supp. at 1101-02. *Furthermore, the "shield" afforded by the Restatement sections reduces incentives to remedy dangerous conditions and thus conflicts with the Congressional intent to promote safety in the longshoring industry.* House Report, reprinted in 3 U.S. Cong. & Adm. News, *supra,* at 4705. Lastly, a search for an appropriate standard of care for shipowners under the amendments among tort concepts which emerged from a common law classification system of diminishing importance makes little practical sense. The Supreme Court has discussed absorption of common law precedent concerning the duties of real property owners toward persons on their land into the law of admiralty and has flatly condemned the effort. See *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959).

(Emphasis added)

With reference to the question of control, the court stated at page 495:

However, analysis based upon retention or relinquish-

> ment of control poses a potential for abuse by courts which view the commencement of cargo operations as extinguishing the liability of vessels for injuries subsequently sustained by longshoremen. See, *e.g., Frasca v. Prudential-Grace Lines, Inc., supra,* 394 F. Supp. at 1101-02 (duration of stevedore's control absolved shipowner of negligence in providing an unsafe place to work). Furthermore, reliance on rules respecting the duties of contractors and subcontractors has the potential of introducing complex common law concepts into admiralty law and thus invoking the same criticisms raised above in the discussion of invitees on real property. *Federal courts should, therefore, avoid reference to principles of control as a substitute for a thorough investigation of the reasonableness of conduct under given circumstances. See generally The Injured Longshoreman, supra,* 28 Hastings L.J. at 788-90.

(Emphasis added)

The logical result of the lack of the "balanced inquiry into the reasonableness of a vessel's conduct under the circumstances of a particular case" which Judge Orrick warned about above, is seen demonstrably in the case of *Wiles v. Delta Steamship Lines,* 1976 A.M.C., 2646 (E.D. La., 1976). In that case, the trial court, sitting as the finder of the fact, found that approximately three weeks prior to the injury, a rung of the ladder had been knocked off during cargo operations in Africa. Both the ship's captain and the chief mate were aware of the incident and that the rung was missing. Repairs for the ladder were scheduled. No warning of the missing rung on the hatch ladder was given to the injured longshoreman and he was unaware of the condition of the ladder. As he climbed down the ladder, he lost his grip at the missing rung and fell to the bottom of the hold sustaining injuries. The court applied the following rule at 1976 A.M.C. 2649.

> Under the 1972 amendments to the Longshoremen's and Harbor Workers Compensation Act (LHWCA), this action is governed by the same law of negligence

as applies to the relationship between an owner of land and an independent contractor/business invitee. See 33 U.S. Code, sec. 905(b); 1972 U.S. Code & Admin. News, pp. 4703-04; *Fedison v. Vessel Wislica,* 1974 AMC 1967, 382 F. Supp. 4, 6-7 (E.D. La., 1974). The pertinent principles have been summarized as follows:

> The owner of a premise [vessel] who contracts with an independent contractor (business invitee) to perform services for the owner upon the owner's premises owes a duty to the independent contractor and his employees to exercise reasonable care to have the premise in a reasonably safe condition for use by the independent contractor and to give said contractor warning of any concealed or latent defects that are known by the owner and not by the independent contractor. The owner of a premise is under no duty to warn the independent contractor or his employees of dangers or open and obvious defects which are known to the independent contractor or his employees or which could be readily observed by said employees in the exercise of ordinary care.

See *Hite v. Maritime Overseas Co.,* 1974 AMC 1274, 1279, 380 F. Supp. 222, 226 (E.D. Tex., 1974) and cases cited therein. See also *Cummings v. "Sidarma" Soc.,* 409 F. Supp. 869, 871-72 (E.D. La., 1976); *Fitzgerald v. Compania Naviera La Molinera,* 1976 AMC 739, 394 F. Supp. 413, 415 (E.D. La., 1975).

The trial court found that from an area across the main deck looking toward the ladder, the missing tenth rung would have been clearly visible to the longshoremen, and, therefore, "the defendant owed no duty to notify plaintiff of a defective ladder that readily could have been observed in the exercise of reasonable care." 1976 A.M.C., at 2653. The court, therefore, barred the plaintiff from recovery even though the shipowner was manifestly negligent.

The Fifth Circuit reversed at 574 F.2d 1338 (5th Cir. 1978) in a *per curiam* decision which cited *Gay, supra.*

The court pointed to §343A, the admiralty rule of comparative negligence, and the primary question of whether the vessel owner was negligent. Although the court did not refer to the antithesis between the restatement sections and the prohibition against use of assumption of risk and contributory negligence, the court strongly advocates the more balanced inquiry advocated in *Gallardo, supra.* The lack of discussion does nothing to reconcile the use of §§343 and 343A with congressional prohibitions against assumption of risk and contributory negligence.

Finally, other courts have held that the inclusion of §§343 and 343A in a longshoreman's negligence action against a shipowner embodied the forbidden concepts of assumption of risk and contributory negligence and, therefore, were inapropriate. *Johnson v. A/S Ivarans Rederi,* 613 F.2d 334, 347 (1st Cir. 1980); *Griffith v. Wheeling-Pittsburgh Steel Corp.,* 610 F.2d 116, 125 (3d Cir. 1979); *Santos,* 598 F.2d at 490; *Brown v. Ivarans Rederi A/S,* 545 F.2d 854, 863 (3d Cir. 1976); *Shepler v. Weyerhaeuser Company,* 279 Or. 477, 569 P.2d 1040, 1050 (Or. 1977), *cert. denied,* 434 U.S. 1051.

Thus, the courts that have most recently examined the developing case law have concluded that any incorporation of the substance of the defenses of contributory negligence and assumption of the risk through §§343 and 343A of the Restatement is error. Further, that the cited sections are so permeated with assumption of risk and contributory negligence concepts that the proper approach to a trial of a case such as the one at bar is to apply the test stated in this case at 485:

> A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner
>
> (a) Knows of, or by the exercise of reasonable care would discover, the condition, and should real-

ize that it involves an unreasonable risk of harm to such longshoremen, and

(b) The shpowner fails to exercise reasonable care under the circumstances to protect the longshoreman against the danger.

Griffith, supra; Johnson, supra.[13] The test adopted by these courts is supported by, and patterned after, this Court's decision in *Kermarec, supra,* wherein this Court said at 630:

> It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew. . . .
>
> The distinctions which the common law draws between licensee and invitee were inherited from a cultured deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine graduations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. *Through this semantic morass the common law has moved, unevenly and with hesitation towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances."*

For the admiralty law at this late date to import such conceptual distinctions would be foreign to its

13. The standard is in accord with traditional negligence concepts. W. Prosser, Handbook of the Law of Torts, §§32 p.151 (4th ed. 1971); Fleming, The Law of Torts, 111 (3rd ed. 1965). The standard is consistent with congressional intent expressed in the oil spill example that a shipowner should exert "reasonable care . . . under the circumstances" Appendix A-10; *Shepler v. Weyerhaeuser, supra,* at 569 P.2d 1047.

> traditions of simplicity and practicality. . . . *We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.*

(Emphasis added) *Accord, Federal Marine Terminals Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 416 (1969)

It would be anomalous, indeed, if the maritime law, after generations of rejecting assumption of risk principles, would suddenly adopt such a doctrine at precisely the same time the common law of premises liability is evolving toward the elimination of the doctrine through the elimination of status designations. The modern trend of premises liability is toward the view that a landowner owes reasonable care to anyone lawfully on his premises. *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968); Annot., 32 A.L.R. 3d 508 (1970), "Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser"; *Webb v. City and Borough of Sitka*, 561 P.2d 731 (Alas. 1977); *Cates v. Beauregard Electric Cooperative, Inc.*, 328 So. 2d 367 (La. 1976), *cert. denied*, 429 U.S. 833 (1976); *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977); *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E. 2d 43 (Mass. 1973).

D. Negligence-Concurrent Negligence-Comparative Negligence

The negligence, if any, a jury might find, of a fellow servant of Santos, should not be a bar to recovery. *Edmonds, supra*, 443 U.S. 265, 266; *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 47 S. Ct. 19 (1926); *Griffith, supra*, 610 F.2d 124; *Santos at* 598 F.2d 489, 490.

In the case at bar, the jury could find that the shipowner was negligent in allowing the winch to remain faulty for almost three full work days, but could also find that the winch driver and/or hatch tender and/or Santos and/or

his employer were somewhat negligent also. It is a factual question whether the negligence of Santos, Santo's employer, Santos' fellow workmen or the shipowner solely or concurrently caused the injuries. The shipowner cannot avoid liability by pointing to the fact that there was a concurrent duty upon the plaintiff's employer to refrain from negligent actions. *Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 324 (2d Cir. 1978); *Landon v. Lief Hoegh and Co.*, 521 F.2d 756, 763 (2d Cir. 1975). An injured longshoreman cannot be vicariously responsible or negligent because of the negligence of the stevedore employer or a fellow workman. *Marant v. Farrell Lines*, 550 F.2d 142, 151 (3d Cir. 1977); *Griffith supra*, at 610 F.2d 124.[14]

This Court has recently spoken on the question of concurrent negligence in the *Edmonds* case, *supra*, at 443 U.S. 259:

> As that law had evolved by 1972, a longshoreman's award in a suit against a negligent shipowner would be reduced by that portion of the damages assignable to the longshoreman's own negligence; but, as a matter of maritime tort law, the shipowner would be responsible to the longshoreman in full for the remainder, even if the stevedore's negligence contributed to the injuries. This latter rule is in accord with the common law, which allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident.

The clear message from the case and the authorities

---

14. The court in *Griffith* said at 124:

"The proposed rule thus imputes to the non-negligent longshoreman the negligence of his stevedore employer, and establishes that negligence as a complete bar to recovery against the vessel. This result is at variance with the Supreme Court's interpretation of the 1972 Amendments in *Edmonds v. Compagnie Generale Transatlantique, supra.* It is inconceivable to us that the Court, which disapproved a rule that imputes the negligence of the stevedore to the longshoreman to *reduce* his recovery against a negligent shipowner, would approve a rule baring all recovery against a negligent shipowner on the basis of imputed employer negligence."

cited is that where there is evidence of negligence of several parties, one of whom is the shipowner, the longshoreman has the right of recovery against the shipowner, with a reduction in his award for the proportion of his *own personal, contributory negligence only*. The longshoreman does not have to show the shipowner *solely* responsible in order to recover on a negligence cause of action. It is axiomatic, there can be more than one proximate cause of an injury.[15] The circuit court herein observed at 598 F.2d 489:

> Thus, the contributory negligence of the longshoreman's employer or fellow longshoreman will not preclude or diminish recovery through a theory of imputed contributory negligence. It is the longshoreman's own negligence that will reduce his recovery from the negligent vessel.

E. Safe Place To Work — Dangerous Conditions

The legislative reports refer to the duties of the shipowner:

> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required *to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.*
>
> So, for example, where a longshoreman slips on a vessel's deck and is injured, the proposed amendments to Section 5 *would still permit an action against the vessel for negligence. To recover he must establish that*: 1) *the vessel put the foreign substance on the*

---

15. 3 E. Devitt and C. Blackmar, Federal Jury Practice and Instructions, §80.19, p. 29 (3rd Ed. 1977); 6 Washington Practice, Washington Pattern Jury Instructions, Civil, (1967), W.P.I. 15.01; 57 Am. Jur. 2d §176 p. 542 (2d ed. 1971); *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975); *Bender v. Dingworth*, 425 F.2d 378 (5th Cir. 1970); *Miller Adm. v. Union Pacific R. Co.*, 290 U.S. 227 (1933); W. Prosser, Handbook of the Law of Torts 239 (4th ed. 1971).

> *deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances.* The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

(Emphasis added). Appendix I-10. Santos contended that the shipowner was negligent for failing to furnish him with a safe place to work. Cases which recognize that a shipowner is required to exercise reasonable care under the circumstances to furnish the longshoreman with a safe place to work are: *Migut v. Hyman-Michaels Co.*, 571 F.2d 352, 356 (6th Cir. 1978); *Hess v. Upper Mississippi Towing Corp.*, 559 F.2d 1030, 1033 (5th Cir. 1977); *Napoli v. Hellenic Lines Ltd.*, 536 F.2d 505, 507 (2d Cir. 1976); *Brown v. Ivarans Rederi A/S*, 545 F.2d 854, 860 (3d Cir. 1976); *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F.2d 636, 638 (4th Cir. 1968); *White v. United States*, 400 F.2d 74, 76 (4th Cir. 1968); *Solsvik v. Maremar Compania Naviera, S.A.*, 399 F. Supp. 712, 715 (W.D. Wash. 1975); *Slaughter v. Ronde*, 390 F. Supp. 637, 645 (S.D. Ga. 1974), *aff'd per curiam*, 509 F.2d 973 (5th Cir. 1975); *Shepler v. Weyerhaeuser Co.*, 279 Or. 477, 569 P.2d 1040, 1056 (Or. 1977); *Cf., West v. United States*, 361 U.S. 118, 123 (1959).

The committee reports made it very clear that nothing was to "derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." Thus, actions were permitted against the vessel to encourage safety. It is ironic that since the amendments, the courts applying the "open and obvious danger" approach seem to hold that the more dangerous a ship is, and the more obvious that danger is, the less likely it is that a shipowner can be held responsible for a longshoreman's injuries. Surely, Congress did not intend to encourage shipowners to ignore danger-

ous conditions aboard their ships, and yet this was precisely the impact of the holding of the district court in this case.

The circuit court's decision restores the dual safety obligations of the shipowner and stevedore as Congress intended. A shipowner is not absolved from his responsibilities simply by pointing at an alleged failure of another actor. The negligence of all the actors must be weighed and evaluated just as Congress intended. Thus, the practical and simple approach of the Ninth Circuit in this case is the best means to accomplish the intent of Congress.

F. Argument In Response To Petitioner's Brief

Petitioner argues that reference to the *Albanese* case[16] in the committee reports was a comment on the negligence cause of action which was retained after the amendments.

The argument is fallacious because the citation of the *Albanese* case in the legislative history does not refer to negligence, but rather to the abolition of unseaworthiness. The reports explicitly denied comment on the negligence remedy.[17]

The requirement for actual notice of any danger as urged by petitioner would fly in the face of the committee reports that state "nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate action where it knows *or should have known about a dangerous condition.*" Appendix I-10.

The petitioner argues that a great number of premises liability cases should be looked to to limit the duty of the shipowner by the limitations in §§343 and 343A of the

---

16. *Albanese v. N/V Nederl. Amerik Stomov. Maats,* 346 F.2d 481 (2d Cir.), *rev'd per curiam,* 382 U.S. 283, 15 L.Ed. 327, 86 S.Ct. 429, *reh. den.,* 382 U.S. 1000, 15 L.Ed.2d 490, 86 S.Ct. 534 (1965).

17. *This listing of cases is not intended to reflect a judgment as to whether recovery on a particular actual setting could be predicated on the vessel's negligence.* (Emphasis added) (Appendix I-10).

Restatement (Second) of Torts. The answer to this argument is contained at Section C of this brief.

Petitioner argues that other sections of the restatement should be applied. At no point in this case, until petitioner's brief, has anyone suggested the application of the other restatement sections (§§409-415). To the extent that these sections exonerate a shipowner from responsibility for his own negligence, they are clearly in conflict with the legislative intent.[18] The shipowner, under these sections would simply not be vicariously liable for the negligence of the stevedore. Nor is the shipowner vicariously liable under the test applied by the Ninth Circuit. Santos alleged and proved in a preliminary fashion the independent negligence of the shipowner.

Petitioner's brief, and Section II, in particular, is based on the assumption that the shipowner was "minimally" and "remotely" responsible and the stevedore employer was "better able to make that decision [concerning the winch] than the shipowner." The petitioner assumes that the shipowner has been "minimally" responsible and the stevedore company has been "greatly at fault." This approach permeates the brief of petitioner and petitioner's amicus brief. This approach is a subversion of the jury's function of fact finding. The relative knowledge, control, and fault of the actors is for the jury. The determination cannot be made by petitioner in his brief anymore than by the district court in a motion for summary judgment.

Petitioner argues that safety considerations are not promoted by the rule adopted by the court of appeals, but the

18. "Furthermore, reliance on rules respecting the duties of contractors and subcontractors has the potential of introducing complex common law concepts into admiralty law and thus invoking the same criticisms raised above in the discussion of invitees on real property. Federal courts should, therefore, avoid reference to principles of control as a substitute for a thorough investigation of the reasonableness of conduct under given circumstances. *See generally The Injured Longshoreman, supra,* 28 Hastings L.J. at 788-90." *Gallardo, supra,* 435 F. Supp. at 495.

rule it suggests would insulate the shipowner from all liability in cases in which the "control" is in the stevedore company or dangers are "open and obvious."

An article in 28 Hastings L. J., 771 (1977), Note, "The Injured Longshoreman v. The Shipowner after 1972: Business Invitees, Land-based Standards, and Assumption of Risk," states at 772:

> The business invitee standard, however, defines the vessel's duty in terms of the plaintiff's perception, frequently preventing inquiry into the reasonableness of the vessel's conduct. *Thus, the standards not only fails to encourage the vessel to take remedial action, but also contravenes the comparative negligence policy of balancing relative fault of all of the parties involved.* Moreover, the business invitee standard incorporates the defense of assumption of risk which the legislative history expressly abolished.

(Emphasis added). Further, incorporation of assumption of risk into the definition of the shipowner's duty requires the longshoreman to bear the burden of proving that he did not assume the risk. *See* "The Injured Longshoreman," *supra,* at 781.

The petitioner's approach does not promote safety but simply immunizes the shipowner from any possibility of liability.

The court in *Galardo, supra,* at 435 Fed. Supp. 494, concluded that the restatement sections reduced the shipowner's "incentives to remedy dangerous conditions," and, therefore, conflicted with congressional intent to promote safety in the longshoring industry. The circuit court in this case stated that the standard it adopted "will promote safety within a comparative negligence framework while avoiding both liability without fault and the defenses of contributory negligence and assumption of risk." *Santos* at 498 F.2d 486. *See also, Landon v. Lief Hoegh & Co.,* 521 F.2d 756, 763 (2d Cir. 1975). Congress unequivocally

stated that it believed that the preservation of the negligence action would promote safety. It said:

> *Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work.* Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

(Emphasis added). Appendix I-10. Petitioner suggests that immunity from liability for the shipowner is the only way to encourage safety. Immunity was asked of Congress and rejected specifically. The reports state:

> *The Committee rejected the proposal originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act.* The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

(Emphasis added). Appendix I-7.

Petitioner argues that "third-party actions continue to divert resources to attorneys for what is often little or no benefit to the injured worker, and in so doing undermine the security inherent in the compensation system." (Petitioner's Brief at 28)

The argument is faulty because resources cannot be diverted from the compensation system by reason of third-party suits. The amendments absolutely and clearly ban the return of any indirect liability of the employer under the *Ryan* case, supra. Thus, there can be no diversion of

compensation resources because the amendments state that "the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." 33 U.S.C. §905(b) (1976). The compensation system pays no more than the scheduled compensation benefits regardless of the fault of the employer or any one else.[19]

Both petitioner and petitioner's amicus argue that the rule of the Ninth Circuit completely exonerates the stevedore employer and, therefore, the stevedore is encouraged to be negligent because it knows it will not have to bear the cost of any injuries. This argument is patently transparent because in all cases of injury to longshoremen, the stevedore company is required to pay compensation benefits without regard to questions of fault, there is no guarantee that any individual longshoreman will bring a third-party action against the shipping company, there is no guarantee that any individual longshoreman who brings an action against the shipping company will recover, and there is no guarantee that the amount of recovery will be sufficient to repay the stevedore company's lien. Thus, the argument cannot stand because in all cases of shipboard injury to longshoremen the stevedore company must pay under the compensation act and there is certainly no guarantee that any reimbursement will be made on the stevedore company's lien. The certainty of compensation benefits, thus requires, that the stevedore employer exercise as much care as possible, but, at the same time, the possibility that there can be a third-party recovery against the shipowner also encourages the shipowner to be prudent in its responsibility to furnish a safe place to work and to make sure conditions aboard the vessel are reasonably safe. This is perfectly consistent with the congressional concept that there are mutual duties and in-

19. However, the compensation system can become more secure by the collection of its lien rights for damages caused by negligent shipowners. 33 U.S.C. §933.

centives for both the stevedoring company and the shipowner to maintain safety in the working place.

Petitioner cites Prosser in arguing that the circuit court's decision in this case overlooks the first element in a negligence action; namely, duty. The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.[20] The work relationship involving shipowners and longshoremen is one discussed in the committee reports and the legal protection to longshoremen flowing out of that relationship is one which requires the shipowner to exercise due care to provide "a safe place to work" and to take "appropriate corrective action where it knows or should have known about a dangerous condition.[21]

Petitioner argues that the shipowner should be insulated from any responsibility to longshoremen once the working area has been turned over to the longshore crew. The oil spill example at Appendix I-10 certainly refutes this argument, since the question of control, time limits, obviousness of danger and turning over the work areas are not mentioned as limits on the shipowner's duty. It is significant, however, that the reports state that "nothing

20. "The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. It is therefore not surprising to find that the problem of duty is as broad as the whole law of negligence and that no universal test for it ever has been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis in itself. It is embedded far too firmly in our law to be discarded, and no satisfactory substitute for it, by which the defendant's responsibility may be limited, has been devised. But it should be recognized that "duty" is not sacrosanct in itself, but only an extension of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.

There is little analysis of the problems of duty in the courts. Frequently it is dealt with in terms of what is called 'proximate cause,' usually with resulting confusion. In such cases, the question of what is 'proximate' and that of duty are fundamentally the same: whether the interests of plaintiff are to be protected against the particular invasion by the defendant's conduct." W. Prosser, Handbook of the Law of Torts, 325, 326 (4th ed. 1971).

in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition."[21] The continuing duty of the shipowner is therefore obvious.

Petitioner argues that since this court decided *Edmonds, supra,* there is no fair way that a case, such as the one at bar, can be handled except to dismiss it on the same basis that the district court did. It is respectfully submitted that the question of proportional contribution is not an issue in this case, but rather, the only question is whether the shipowner acted prudently under the circumstances existing at the time of the accident.

Petitioner decries the fact that the rule adopted by the Ninth Circuit makes summary dismissal of cases more difficult. The object of Congress was not to provide for easy dismissal of cases of shipowners' negligence. Congress specifically preserved the right of injured workmen to sue ships for negligence. To argue the cost of litigation, the need to dismiss cases, and the need to regulate attorneys' fees, is to argue irrelevancies. If Congress had desired to regulate attorneys' fees, it could have easily done so. If Congress had decided to eliminate causes of action for negligence, it could easily have done so. If Congress had decided to immunize shipowners from their own negligence, it could easily have done so. On the contrary, Congress decided to preserve the cause of action for negligence against shipowners and litigation was foreseen as the vehicle for deciding disputed questions. Appendix I-11.

G. Response to Amicus Brief in Support of Petitioner

1. Amicus argues that the shipowner has no responsibility in this case as a matter of law because the stevedore employer was the only party with actual knowledge of an unsafe condition, the stevedore controlled the area, and the

21. Committee Reports, Appendix I-10.

stevedore had affirmative duties under the safety and health regulations for longshoring to either report the defective winch or to not use it. As a result, therefore, amicus urges adoption of the trial court's dismissal by means of the summary judgment device. The arguments of the amicus are fallacious for the following reasons:

(a) 29 C.F.R. §1918.2(b) and 29 C.F.R. §1915.1(d) make it clear that the responsibility for safety can be dual; that is, can rest both on the stevedore-company and on the shipowner. Thus, the regulation states:

> It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers. *Nor is it the intent of these regulations to release such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.*

(Emphasis added) Thus, even though the regulations are directed against the longshore employer, nothing in them derogates from the responsibility of the shipowner to perform duties placed upon him by law, regulation or custom. The regulations pre-dated the amendments of 1972 and are still in effect today. Thus, it is submitted that the committee reports took into account and reaffirmed the mutual obligations of both stevedore employer and shipowner.[22] The plain language of the reports makes it clear that the shipowner has a concurrent responsibility to exercise reasonable care to provide a safe place to work, which continues.

---

22. The committee reports state:
"Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition."
The reports go on to cite the oil spill example which permits actions against the vessel for negligence in cases in which the oil or foreign substance "had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances." (Appendix I-10)

(b) Amicus assumes, in the same manner that the district court assumed, that the shipowner did not have actual knowledge of the malfunctioning winch nor should it have acquired knowledge in the exercise of reasonable care. This assumption is an erroneous "finding of fact" in the same sense the trial court's conclusion was an erroneous "finding of fact."[23]

(c) The effect of the amicus argument is to simply use any evidence of negligence on the part of the stevedore company or its employees to immunize itself from all liability. Not only did Congress not intend this result, but this Court in the *Edmonds* case, *above,* rejected the concept that a concurrent tortfeasor may be either freed from its responsibility in whole or in part by pointing to the negligent acts of the stevedore employer. In 2A A. Larson, The Law of Workmen's Compensation §75.22 at 14-263 (1976), Professor Larson states that when an employer's negligence concurs with a third party's negligence in causing an employee's injury "it is generally held that the employer cannot be met with the defense that his own employer's negligence contributed to the injury." The real effect of the argument of the amicus is that the concurrent negligence of the employer, as alleged in this case, must be an absolute and total defense against the claim of the employee for injuries against the shipowner. Thus, the result the amicus urges is the same result which was rejected in the *Edmonds* case above that "leads to the conclusion that the injured longshoreman should *never* be able to bring suit against the vessel unless it is the sole cause of the injury. This is a doubly absurd conclusion." *Edmonds, supra,* 443 U.S. 265, 266.

---

23. A jury could find that, in the words of Hawran, "the day shift was complaining [about the winches] and they [the shipowner] just can't seem to do anything with them."

A jury could find that the shipowner had an adequate opportunity to discover the malfunctioning winch, that complaints were made, that the condition had existed for two and one-half days prior to the accident, and that the shipowner's representatives were in the area throughout the loading.

The amicus attaches three addenda which not only are not in evidence in this case, but are irrelevant to the issues in this case. Respondent respectfully objects to those addenda and asks that they be stricken as improper. Likewise, the arguments based on the addenda are improper and should be stricken and ignored.

Thus, the amicus argues the vast and munificent benefits flowing to injured longshoremen from the compensation act under Addenda B and C.[24] Neither schedule is properly before the court since neither is in evidence or in the record. To argue as amicus does, that the cumulative benefits over thirty-one years to a totally disabled longshoreman would amount to $2,263,834.00 is just as irrelevant as if the respondent were to argue that as a result of his injuries Mr. Santos has been subjected to horrendous pain and suffering, three major surgeries, quadraplegia, and has been denied his benefits under the Act and, therefore, his wife and five children are starving.

The amicus argument concerning "blindfolding the jury" is irrelevant because there is no issue of damages before the Court in this case. Likewise, the final argument of the amicus concerning the reduction in numbers of longshoremen's personal injury cases is totally irrelevant and inappropriate to any consideration of the issues in the case at bar.

---

24. Identical bills are pending in the House and Senate which would greatly reduce the benefits payable under the Act. S.1511, 96th Cong., 1 CCH Cong. Index, 14,217 (1980); H.R. 2448, 96th Cong., 2 CCH Cong. Index 28,276 (1980).

V.
CONCLUSION

The decision of the circuit court in this case is carefully cognizant of, and faithful to, the intent of Congress in amending the Act. The unseaworthiness remedy is abolished, but the negligence remedy is preserved along with the prohibitions against assumption of risk and contributory negligence. Subjecting a vessel to liability for injuries to longshoremen working on or near a vessel if the shipowner knew or should have known of dangerous conditions creating an unreasonable risk to longshoremen and failed to exercise reasonable care under the circumstances to protect the longshoreman, is consistent with traditional negligence principles as adopted by this court in the *Kermarec* case. The standard adopted by the Ninth Circuit is simple, practical and workable. The decision of the Ninth Circuit should be affirmed in all respects.

Respectfuly submitted,

JAMES A. GRUTZ
JACKSON, ULVESTAD,
GOODWIN & GRUTZ
Attorneys for Respondent,
Lauro De Los Santos

APPENDIX I

Pertinent excerpts from Senate Report No. 92-1125, 92nd Congress, 2nd Session:

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

SEPTEMBER 14 (Legislative day, SEPTEMBER 12), 1972. —

Ordered to be printed

Filed under authority of the order of the Senate of September 13, legislative day, September 12, 1972

MR. EAGLETON, from the Committee on Labor and Public Welfare, submitted the following

REPORT

[To accompany S. 2318]

The Committee on Labor and Public Welfare, to which was referred the bill (S. 2318) to amend the Longshoremen's and Harbor Workers' Compensation Act, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

SUMMARY

The principle purpose of S. 2318 is to amend the Longshoremen's and Harbor Workers' Compensation Act in order to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties and to promulgate necessary administrative reforms.

The benefit structure provided by S. 2318 will allow a disabled worker to receive ⅔ of his average weekly wage subject to a phased in maximum starting at 125 percent of the national average weekly wage and rising in three years to 200 percent of the national average weekly wage. Minimum benefits would also increase to not less than 50 percent of the national average weekly

wage, or the average weekly wage of the disabled worker, whichever is less. The new maximum and minimum limits are substantially higher than the present maximum of $70 per week, and present minimum of $18 per week, which were established in 1961.

The changes also provide for annual increases in compensation benefits based on increases in the national average weekly wage, an upgrading of benefits payable for injuries occurring before the effective date of the Act, elimination of the present ceiling on temporary disabilities, and expansion of survivors benefits and the schedule of awards for disfigurements.

The bill also expands the coverage of this Act to cover injuries occurring in the contiguous dock area related to longshore and ship repair work.

The bill also resolves the longstanding dispute over third-party actions by injured longshoremen by providing that such actions may be brought against vessels on the basis of negligence, but the remedy based on unseaworthiness is eliminated. In addition, indemnity actions against stevedoring companies are prohibited. Agreements between stevedoring companies and vessels to indemnify the later are prohibited.

A number of important administrative changes are made in the bill respecting both the worker's rights and the operations of the Department of Labor. Among the features of the administrative changes are that hearings be conducted according to the Administrative Procedure Act, assistance (including discretionary legal assistance where circumstances warrant) be provided claimants, medical services allowing for free choice of doctors and reduction of waiting periods for compensation. A review board for compensation cases is created within the Department of Labor and a special fund to handle second injury cases, rehabilitation and retroactive benefit payment is revised and expanded.

In considering S. 2318 the committee has given most careful consideration to the recommendations of the National Commission on state workmen's compensation laws contained in its report issued on July 21, 1972. The com-

mittee believes that the provisions in this bill are fully consistent with the recommendation of the National Commission and that the Longshoremen's and Harbor Workers' Compensation Act, as it would be amended by S. 2318, will provide an adequate, prompt, and equitable system of compensation for the over 800,000 employees who depend upon its protection.

SAFETY

It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.

This consideration is particularly crucial with respect to high-risk occupations such as those covered by this Act. Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry, and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a workmen's compensation system which maximizes industry's motivation to bring about such an improvement.

BACKGROUND

On July 21, 1971, S. 2318 was introduced by Senator Williams for himself and nine other Senators. A similar bill, S. 525 was introduced by Senator Prouty, and Senator Tower introduced S. 1547, a bill to extend the coverage of the Longshoremen's and Harbor Workers' Compensation Act to marine petroleum workers.

The Subcommittee on Labor held hearings on these bills on May 2, 10, 17, and 24, 1972 in Washington, D.C. and on June 5, 1972 in San Francisco, California. A field trip to examine actual working conditions was held by the Subcommittee in San Francisco and Oakland, California on June 4, 1972.

Testimony was received from the Secretary of Labor in support of the increase in benefits and a revision of the law regarding third party liability for injuries to longshoremen.

Statements were received from the following persons who represent employers involved in industries covered by the Longshoremen's and Harbor Workers' Compensation Act: Ralph Hartman and Edward Hood, representing the Shipbuilders Council of America; Andre Maisonpierre, Vice President of the American Mutual Insurance Alliance; Francis A. Scanlan, James A. Flynn, and Edward D. Vickery on behalf of the National Maritime Compensation Committee; Dennis Lindsay, representing the Master Contracting Stevedoring Association of the Pacific Coast, Inc.; Capt. John H. Anthony, President of the Metropolitan Stevewore Co.; Fred R. Smith, Chairman of the Board of the Seattle Stevedore Co. & Southeast Stevedoring Corp.; Emmett J. Pierce, Vice President of the Marine Terminals Corp.; Chester Eschen, Jr., President of the California Stevedore & Balast Co.; and Robert P. Benfield, Vice President of Bayly, Martin & Fay, Inc., insurance brokers.

The Board of Trade for the District of Columbia asked that separate workmen's compensation legislation be passed to cover the District of Columbia.

Testimony was also received from the following representatives of employees covered by the Act and by lawyers who represent such employees, all of whom favored the increased benefits which are contained in the substitute bill: Howard McGuigan and James O'Brien of the Social Security Department, AFL-CIO, and George Apperson, President, Greater Washington Central Labor Council, AFL-CIO; Thomas Gleason and Joseph Leonard, of the International Longshoremen's Association; Patrick Tobin, Julius Stern, Everett Ede, Richard Gladstein, and Tom Lupher of the International Longshoremen's and Warehousemen's Union; Mario Grossetti and C. W. Huddleston of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers; David B. Kaplan, Chairman of the Admiralty Section, American Trial Lawyers Association; and John R. Martzell, representing the Louisiana Trial Lawyers Association.

Representatives of employees employed in private industry in the District of Columbia indicated these workers desired continued coverage under the Longshoremen's and Harbor Workers' Compensation Act.

Testimony was received from Joseph Shelton and E. Leland Richardson, representing the International Association of Drilling Contractors, in support of S. 1547, and from William Moody, representing the Maritime Trades Department, AFL-CIO, in opposition.

Other statements by interested parties were also received.

S. 2318 was reported favorably by the Subcommittee on Labor on August 17, 1972 and was considered by the full Committee on Labor and Public Welfare on September 8, 1972 which unanimously reported it to the Senate.

NEED FOR THE BILL

The Longshoremen's and Harbor Workers' Compensation Act was last amended in 1961, at which time the maximum benefit under the Act was set at $70 per week. Today the average weekly wage for private, non-agriculture employees in the United States is $135 a week. The average longshoremen's or ship repairman's wage is even higher, with longshoremen averaging $200 per week in some ports. Clearly, in order to provide adequate income replacement for disabled workers covered under this law a substantial increase in benefits is urgently required.

The National Commission on State Workmen's Compensation laws, in its recent report, recommends that the maximum for temporary or permanent total disability be phased up to no less than 200 percent of the statewide average weekly wage. The Committee bill, consistently with this recommended standard, raises the maximum limit on compensation under this Act to 125 percent of the national average weekly wage initially, going up to 200 percent of the national average weekly wage after three years. Of course an individual's benefits, if he qualifies for maximum benefits, would be ⅔ of his average wekly wage or this maximum, whichever is lower.

While everyone has agreed since at least the mid-1960's that the benefits under this Act should be raised, *there has been some dispute over the years as to whether such benefits should be raised so long as this compensation law was not the exclusive remedy for an injured worker. It has been the feeling of most employers that while they were willing to guarantee payment to an injured worker regardless of fault, they would only do so if the right to such payment was the exclusive remedy and they would not be subject to additional law suits because of that injury.*

Since 1946, due to a number of decisions by the U.S. Supreme Court, it has been possible for an injured longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue the owner of the ship on which he was working for damages as a result of his injury. The Supreme Court has ruled that such ship owner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedoring on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen.

The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.

For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that injured workers would be properly protected by the Act. *At the same time, employer groups indicated their willingness to increase such payments but indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.*

The bill reported by the committee meets these objections by specifically eliminating suits against vessels

brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act.

. . . .

ELIMINATION OF UNSEAWORTHINESS REMEDY

One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations. *The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.*

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act, while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with *Seas Shipping Co. v. Sieracki*, 328 U.S. 25 (1946) which held that the traditional seaman's remedy based on the breach of the vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under the *Sieracki* case, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of "unseaworthy" conditions even though the unseaworthiness was caused, created, or brought into

play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. *For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it.* Furthermore, in the example given above, under the Supreme Court's decision in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. *The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.*

The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committees attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

The Committee also has taken note of the inescapable fact that the controversy over third party claims by longshoremen has had political ramifications which have resulted in forestalling any improvements in the present Act for over twelve years.

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board on vessel while it is in port.

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be lable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act, Crumedy vs. The J.H. Fisser, 358 U.S. 423, *Albanese vs. Matts,* 382 U.S. 283, *Skibinski vs. Waterman SS Corp.* 330 F.2d 539; *for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, A.N.G. Stevedores vs. Ellerman Lines,* 369 U.S. 355, *Blassingill vs. Waterman SS. Corp.,* 336 F 2d 367; *for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, Alaska SS Co. vs. Peterson,* 347 U.S. 396, *Italia Societa vs. Oregon Stevedoring Co.,* 376 U.S. 315, *or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular actual setting could be predicated on the vessel's negligence.*

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to tape appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Under this standard, as adopted by the Committee, there will of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the sea worthiness doctrine. *Since the vessel's liability is based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.*

Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention, to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.

Under the proposed amendments *the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages.*

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka,* 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.,* 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of Risk" in an action by an injured employee shall also be applicable.

Finally, the Committee wishes to emphasize that nothing in this bill is intended to relieve *any vessels or any other persons from their obligations and duties under the Occupational Safety and Health Act of 1970.* The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee

expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupational health and safety. (Emphasis added)

* * * *

The House Report No. 92-1441, 92nd Congress, 2nd Session, reprinted in 1972 U.S. Code Cong., and Admin. News 4698-4705 is identical in its discussion of the legislative history as it applies to the case at bar contained in the section entitled "Elimination of Unseaworthiness Remedy."

APPENDIX II

TITLE E. SPECIAL LIABILITY OF POSSESSORS OF LAND TO INVITEES

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possesor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

See Reporter's Notes.

Comment:

a. This Section should be read together with § 343 A, which deals with the effect of the fact that the condition is known to the invitee, or is obvious to him, as well as the fact that the invitee is a patron of a public utility. That Section limits the liability here stated. In the interest of brevity, the limitation is not repeated in this Section.

b. Distinction between duties to licensee and invitee. One who holds his land open for the reception of invitees is under a greater duty in respect to its physical condition than one who permits the visit of a mere licensee. The licensee enters with the understanding that he will take the land as the possessor himself uses it. Therefore such a licensee is entitled to expect only that he will be placed upon an equal footing with the possessor himself by an adequate disclosure of any dangerous conditions that are known to the possessor. On the other hand an invitee enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the

possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation. He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances.

As stated in § 342, the possessor owes to a licensee only the duty to exercise reasonable care to disclose to him dangerous conditions which are known to the possessor, and are likely not to be discovered by the licensee. To the invitee the possessor owes not only this duty, but also the additional duty to exercise reasonable affirmative care to see that the premises are safe for the reception of the visitor, or at least to ascertain the condition of the land, and to give such warning that the visitor may decide intelligently whether or not to accept the invitation, or may protect himself against the danger if he does accept it.

As stated in § 342, the possessor is under no duty to protect the licensee against dangers of which the licensee knows or has reason to know. On the other hand, as stated in § 343 A, there are some situations in which there is a duty to protect an invitee against even known dangers, where the possessor should anticipate harm to the invitee notwithstanding such knowledge.

c. As to invitees who go beyond the scope of the invitation, as to either time or place, see § 332, Comment *l.*

d. What invitee entitled to expect. An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein. Therefore an invitee is not required to be on the alert to discover defects which, if he were a mere licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to dis-

cover a defect, as well as in determining whether the defect is one which the possessor should believe that his visitor would not discover, and as to which, therefore, he must use reasonable care to warn the visitor.

e. Preparation required for invitee. In determining the extent of preparation which an invitee is entitled to expect to be made for his protection, the nature of the land and the purposes for which it is used are of great importance. One who enters a private residence even for purposes connected with the owner's business, is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors. On the other hand, one entering a store, theatre, office building, or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors. So too, one who goes on business to the executive offices in a factory, is entitled to expect that the possessor will exercise reasonable care to secure his visitor's safety. If, however, on some particular occasion, he is invited to go on business into the factory itself, he is not entitled to expect that special preparation will be made for his safety, but is entitled to expect only such safety as he would find in a properly conducted factory.

f. Appliances used on land. A possessor who holds his land open to others must possess and exercise a knowledge of the dangerous qualities of the place itself and the appliances provided therein, which is not required of his patrons. Thus, the keeper of a boardinghouse is negligent in providing a gas stove to be used in an unventilated bathroom, although the boarder who is made ill by the fumes uses the bathroom with knowledge of all the circumstances, except the risk of so doing. This is true because the boardinghouse keeper, even though a man of the same class as his boarders, is required to have a superior knowledge of the dangers incident to the facilities which he furnishes to them.

g. As to the duty of a possessor of business premises to protect his invitees from harm threatened thereon by third persons, see § 344.

§ 343 A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

See Reporter's Notes.

Comment on Subsection (1):

a. The rule stated in this Subsection applies to all persons who enter or remain on land in the capacity of invitees, as defined in § 332. It includes in particular the patrons of a public utility who enter land in its possession seeking its services, to which as members of the public they are entitled; and it includes members of the public making use of the land of the government or a government agency which is held open for the use of the public. As is stated in Subsection (2), such a public utility, government, or government agency may have special reason to anticipate that one who so enters will proceed to encounter known or obvious dangers; and such a defendant may therefore be subject to liability in some cases where the ordinary possessor of land would not.

b. The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.

c. The possessor's activities may involve a risk which is known or obvious to those who enter his land, either because the risk is inherent in the nature of the activity

itself, or because they are aware that it is carried on in a manner which involves risks that are not necessarily inherent in such activities.

d. A statute may require the possessor of land to keep it, or anything upon it, in a condition safe for invitees, or even for licensees, or to take particular precautions for the safety of such visitors. If so, the fact that the visitor knows that the possessor has not complied with the requirements of the statute does not prevent the possessor from being subject to liability for his breach of his statutory duty. Such knowledge of the violation is material only in determining whether the visitor is to be charged with contributory negligence, or assumption of risk, in coming in contact with the dangerous condition. As to this, see § 288 B and Comment *b* to that Section; also §§ 496 A—496 G.

e. In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

Illustration:

1. The A Company has in its store a large front door, made of heavy plate glass. The door is well lighted and plainly visible, and its existence is obvious to any person exercising ordinary attention and perception. B, a customer in the store, while preoccupied with his own thoughts, mistakes the glass for an open doorway, and runs his head against it and is injured. A Company is not liable to B.

f. There are, however, cases in which the possessor of land can and should anticipate that the dangerous condi-

tion will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§ 466 and 496 D.) It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

Illustrations:

2. The A Department Store has a weighing scale protruding into one of its aisles, which is visible and quite obvious to anyone who looks. Behind and about the scale it displays goods to attract customers. B, a customer, passing through the aisle, is intent on looking at the displayed goods. B does not discover the scale, stumbles over it, and is injured. A is subject to liability to B.

3. The A Drug Store has a soda fountain on a platform raised six inches above the floor. The condition is visible and quite obvious. B, a customer, discovers the condition when she ascends the platform and sits down on a stool to buy some ice cream. When she has finished, she forgets the condition, misses her step, falls, and is injured. If it is found that this could reasonably be anticipated by A, A is subject to liability to B.

4. Through the negligence of A Grocery Store a fallen rainspout is permitted to lie across a footpath

alongside the store, which is used by customers as an exit. B, a customer, leaves the store with her arms full of bundles which obstruct her vision, and does not see the spout. She trips over it and is injured. If it is found that A should reasonably have anticipated this, A is subject to liability to B.

5. A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment. A is subject to liability to C.

Comment on Susection (2):

g. In determining whether the possessor of land should expect harm to invitees notwithstanding the known or obvious character of the danger, the fact that premises have been held open to the visitor, and that he has been invited to use them, is always a factor to be considered, as offering some assurance to the invitee that the place has been prepared for his reception, and that reasonable care has been used to make it safe. There is, however, a special reason for the possessor to anticipate harm where the possessor is a public utility, which has undertaken to render services to members of the public, so that they are entitled to demand the use of its facilities, and to expect reasonable safety while using them. The same is true of the government, or a government agency, which maintains land upon which the public are invited and entitled to enter as a matter of public right. Such defendants may reasonably expect the public, in the course of the entry and use to which they are entitled, to proceed to encounter some known or obvious dangers which are not unduly extreme, rather than to forego the right.

Even such defendants, however, may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid. This is true particularly where a reasonable alternative way is open to the visitor, known or obvious to him, and safe.

Illustrations:

6. An incoming train of the A Railroad deposits B, a passenger, upon a platform from which the only exit is over a footbridge crossing the tracks. Employees of the Railroad have encumbered the bridge with baggage from the train. B, crossing the bridge, attempts to climb over the pile of baggage, falls, and is injured. A Railroad is subject to liability to B.

7. The same facts as in Illustration 6, except that B is told by the train conductor that he may safely walk across the tracks. A Railroad is not liable to B.

8. The only convenient approach from the east to the station of A Railroad is over a footbridge which, through the negligence of the Railroad, is covered with snow and ice. The condition of the bridge is obviously dangerous, but not extremely so. The only other approach to the station, from the west, would require a detour of six blocks. B, a prospective passenger coming from the west, attempts to use the bridge rather than detour, and slips and is injured. A Railroad is subject to liability to B.

9. The A Steamship Company is engaged in unloading a passenger ship. Its pier is encumbered with trunks, baggage trucks, and many other large visible objects, but there is ample room for passage between them. B, a passenger leaving the ship, is preoccupied with her own thoughts, and stumbles over a trunk and is injured. The A Company is not liable to B.

Supreme Court, U. S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-512

In the Supreme Court

OF THE

United States

OCTOBER TERM 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

vs.

LAURO DE LOS SANTOS AND SEATTLE STEVEDORE CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

GRAYDON S. STARING
Two Embarcadero Center
Suite 2600
San Francisco, CA 94111
(415) 421-4600
Attorney for Petitioner

LEGROS, BUCHANAN, PAUL & MADDEN
ROBERT H. MADDEN

LILLICK MCHOSE & CHARLES
EDWARD M. KEECH
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

TABLE OF CONTENTS

	Page
Summary of argument	1
Argument	2
I. The summary judgment does not invade the jury's province	2
II. Respondent provides only confusion as to the sources and nature of the negligence rules to be applied	5
III. Duty and assumption of risk are different concepts, and respondent's argument ignores the distinctions which have been drawn in opinions, commentaries and the Restatement	7
IV. Respondent has urged other misconceptions upon the court	12
A. Misconceptions of petitioner's position	12
B. Misconceptions of law and economic reality	13
Conclusion	15

TABLE OF AUTHORITIES CITED

Cases

Page

Albanese v. N/V Nederl. Amerik Stoomv. Maats., 382 U.S. 283 (1965) 5, 7

Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978) 6

The Arizona v. Anelich, 298 U.S. 110 (1936) 8, 12

Beadle v. Spencer 298 U.S. 124 (1936) 8, 12

Berry v. Atlantic Coast Line R.R., 273 F.2d 572 (4th Cir.), *cert. denied,* 362 U.S. 976 (1960) 4

Chambers v. United States, 357 F.2d 224 (8th Cir. 1966) 4

Edmonds v. Campagnie Generale Transatlantique, 443 U.S. 256 (1979) 13, 14

Elder v. Pacific Telephone & Telegraph Co., 66 Cal. App.3d 650, 136 Cal.Rptr. 203 (1977) 6

Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969) 6

First National Bank v. Cities Service Co., 391 U.S. 253 (1968) 4

Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977) 9

Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1963) 1, 5, 6

Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (S.D. Cal. 1959), *aff'd sub nom.* Metropolitan Stevedore Co. v. Dampskisaktieselskabet International, 274 F.2d 875 (9th Cir.), *cert. denied,* 363 U.S. 803 (1960) 6

Table of Authorities Cited

Cases

	Page
ILWU v. Kuntz, 334 F.2d 165 (9th Cir. 1964)	4
Johnson v. Sioux City & New Orleans Barge Lines, Inc., No. 80-1450 (7th Cir. August 21, 1980), *cert. denied,* 49 U.S.L.W. 3351 (November 10, 1980) (No. 80-359)	14
Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399 (2d Cir.), *cert. denied,* 325 U.S. 861 (1945)	4
Mickle v. The Henriette Wilhelmine Schulte, 188 E. Supp.77 (N.D. Cal. 1960)	6
Owens v. Union Pacific R.R., 319 U.S. 715 (1943)	9
Partenweederei, MS Belgrano v. Weigel, 299 F.2d 897 (9th Cir.), *cert. denied,* 371 U.S. 830 (1962)	4
Riddle v. Exxon Transportation Co., 563 F.2d 1103 (4th Cir. 1977)	9
Rowland v. Christian, 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561 (1968)	6
Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939)	9, 12
Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943)	8, 9, 12
West v. United States, 361 U.S. 118 (1959)	6
Wiles v. Delta Steamship Lines, Inc., 574 F.2d 1338 (5th Cir. 1978)	9

TABLE OF AUTHORITIES CITED

Miscellaneous

Page

2 F. Harper & F. James, The Law of Torts (1956) 7

H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698 5

James, *Assumption of Risk: Unhappy Reincarnation,* 78 Yale L.J. 185 (1968) 11

Keeton, *Personal Injuries Resulting from Open and Obvious Conditions,* 100 U. Penn. L. Rev. 629 (1952) 7, 8, 10, 11

W. Prosser, Law of Torts (4th ed. 1971) 8, 10, 11

Restatement (Second) of Torts (1965):

Section 343 9

Section 343A 9

Section 343A, Comment e 10

Section 388 9

Section 496A 9

Section 496A, Comment d 8

Section 496C 9, 10

Section 496C, Comment e 11

S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972) 5, 7

No. 79-512

In the Supreme Court

OF THE

United States

OCTOBER TERM 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

VS.

LAURO DE LOS SANTOS AND SEATTLE STEVEDORE CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

SUMMARY OF ARGUMENT

1. Respondent's quibbling with the district court's opinion cannot obscure the correctness of that court's conclusion that on the agreed facts, the uncontroverted facts, and assumptions in Respondent's favor on all other material facts, summary judgment was proper.

II. Respondent argues as if the duty question concerned rules of general maritime law, not standards of general and land-based law, and relies virtually exclusively on *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, although *Gutierrez* was based upon a holding of nondelegable duty to the plaintiff, a principle expressly rejected by Congress for the 1972 amendments.

III. Respondent confuses the defense of assumption of risk with the duty element of a *prima facie* case of negligence. The distinction between duty, which arises from foresight and depends upon the reasonable expectation of the defendant, and assumption of risk, which turns solely on what the plaintiff knew, understood and voluntarily agreed to risk, has been acknowledged by judges, scholarly writers and the Restatement of Torts. As Respondent acknowledges, the disavowal of assumption of risk in the legislative history is only a resort to those principles established by this Court's rejection of assumption of risk, and therefore cannot be interpreted as a call for the abolition of restrictions on duty.

IV. Misconceptions in Respondent's brief require correction: the shipowner does not contend that negligence of a co-worker bars recovery, argue that plaintiff must prove it had actual knowledge of the danger, nor contend for immunity from liability; simple economics dictate that lien recoveries will reduce the stevedore company's safety incentive; comparative negligence principles do not indicate that the rule below promotes safety since the negligence of the stevedore company cannot be compared; and the assertion that lump sum payments subject to attorney's fees are as secure as compensation benefits is patently wrong.

ARGUMENT

I

THE SUMMARY JUDGMENT DOES NOT INVADE THE JURY'S PROVINCE

Respondent attacks the summary judgment first by quibbling through the district court's discussion of the facts.

A fair reading shows that the district court made all the necessary assumptions in Santos' favor. But what, if anything, the district court "found" and what assumptions it made are, in the last analysis, immaterial here. The question is simply whether the record supports the summary judgment and not how the district court opinion was written. To test the summary judgment we must take first the material facts expressly agreed in the record and then add those which are uncontroverted, make assumptions in Santos' favor as to any remaining material facts, and apply the proper legal principles to the result.

It has been unquestionably agreed that the stevedore "was in control of the loading";[1] the alleged jumpiness of the winch was known[2] and obvious[3]; a pallet board struck the pallet jack spilling sacks into the hatch;[4] thereafter the balance of the load was lifted about 15 feet while Santos cleaned up below;[5] and, while Santos was still engaged in this work, more sacks fell from the load, one of them striking him.[6] That the stevedore company never re-

---

[1]Pre Trial Order, A.11, Agreed Fact 7.

[2]Brief of Respondent at 5 ("winch had been failing to hold . . . December 8th, 9th and 10th"), 7 (complaint to foreman December 8); Santos' deposition quoted Pet. App., p. A-5.

[3]Respondent's contention that there were two defects in the winch (Brief of Respondent at 20 n.8) is as unavailing as it is disingenuous. Santos himself testified that by "jumpy" he meant the condition resulting from the assumed defective brake. (Santos' deposition, p. 36.) The condition about which Respondent now complains was, in any event, both obvious and known to the stevedore company.

[4]Pre Trial Order, A.11, Agreed Fact 4.

[5]Pre Trial Order, A.11, Agreed Fact 5.

[6]Pre Trial Order, A.11, Agreed Fact 6.

ported or complained to the ship about the winch was uncontroverted by any proffer of evidence[7] of reports or complaints or that the vessel knew about it.[8] It was likewise uncontroverted that the vessel was not required to discover the alleged defect by any established standard,[9] and the vessel did not intervene by giving any directions in the circumstances.[10] It must be assumed, in addition, that the alleged defect of the winch brake caused both the first and the second fall of sacks of grain into the hold. In reviewing the summary judgment, these facts and no more (even those we have called uncontroverted being probably superfluous) are the ones which must be tested against the proper legal standard. It is that standard which must ultimately govern, whether on summary judgment or full trial, and that standard is the principal subject of this case.

---

[7]Summary judgment is not to be denied simply because a plaintiff who does not come up with evidence might do so someday. *See, e.g.*, First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 288-90 (1968); ILWU v. Kuntz, 334 F.2d 165, 169 n.5 (9th Cir. 1964); Chambers v. United States, 357 F.2d 224, 229 (8th Cir. 1966); Berry v. Atlantic Coast Line R.R., 273 F.2d 572, 581-82 (4th Cir.), *cert. denied*, 362 U.S. 976 (1960); Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399, 404-05 (2d Cir.), *cert. denied*, 325 U.S. 861 (1945).

[8]Brief of Respondent at 15 n.5 clearly indicates the lack of such evidence. In that footnote Respondent attempts without foundation in logic or authority to impose the burden of its absence upon the vessel rather than upon the plaintiff.

[9]The record is devoid of any evidence or contention with respect to this standard. *See* Partenweederei, MS Belgrano v. Weigel, 299 F.2d 897 (9th Cir.), *cert. denied*, 371 U.S. 830 (1962).

[10]No such contention appears in the Pre Trial Order, A.12-15.

II

RESPONDENT PROVIDES ONLY CONFUSION AS TO THE SOURCES AND NATURE OF THE NEGLIGENCE RULES TO BE APPLIED

Throughout his brief, Respondent ignores the stated Congressional intent that the negligence remedy be governed by the duty standards of land-based law and treats the inquiry here as one concerning the rules of the general maritime law.

He poses the question whether the 1972 amendments "continue" or "create" a cause of action for negligence to divert attention from the real issue, which is whether the word "negligence" in Section 905(b) will be interpreted as Congress intended to avoid any "special maritime theory of liability" such as "non-delegable duty".[11] When the issue is so framed, it becomes evident that *Gutierrez v. Waterman Steamship Corp.*[12] does not control this case, for *Gutierrez's* negligence holding is founded upon the very principle of nondelegable duty Congress rejected.[13]

> [The shipowner] had an absolute and nondelegable duty of care toward petitioner not to create this risk to him, which it failed to meet.[14]

---

[11]S. Rep. No. 92-1125, 92d Cong., 2d Sess. 10 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4703.

[12]373 U.S. 206 (1963).

[13]*Gutierrez*, indeed, was the very authority aptly cited by this Court to support its ruling in Albanese v. N/V Nederl. Amerik Stoom v. Maats., 382 U.S. 283 (1965), as to which *see* Brief of Petitioner at 12-13.

[14]373 U.S. at 211-12. The Court of Appeals for the First Circuit has recognized that the shadow of *Gutierrez* does not compel con-

Since *Gutierrez* is no longer authority for the rule or the result in the court below, Respondent has failed to cite any case at all from the "large body of case law" he acknowledges existed in 1972[15] to uphold the standard fashioned below. Petitioner, on the other hand, has shown at pages 11-19 of its brief that the standards adopted by the score of decisions in conflict with the decision below are supported by the *Hugev*[16] and *Mickle*[17] cases (cited with approval in *Burnside*[18]), and by the *West*[19] case, all decided before 1972, as well as by the Restatement and the large and consistent body of state law,[20] and that Congress has rejected for the future the standard represented by *Gutierrez* and

---

tradiction of Congress' clearly expressed intention. Anderson v. Iceland S.S. Co., 585 F.2d 1142, 1150 (1st Cir. 1978).

[15]Brief of Respondent at 9-10.

[16]Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (S.D. Cal. 1959), *aff'd sub nom.* Metropolitan Stevedore Co. v. Dampskisaktieselskabet International, 274 F.2d 875 (9th Cir.) (adopting district court opinion), *cert. denied*, 363 U.S. 803 (1960).

[17]Mickle v. The Henriette Wilhelmine Schulte, 188 F. Supp. 77 (N.D. Cal. 1960).

[18]Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969).

[19]West v. United States, 361 U.S. 118 (1959).

[20]Respondent suggests (Brief at 34), as did the court below (Pet. App., p. B-16, 598 F.2d at 488), that Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968), calls for a rule other than that urged by Petitioner. But even in California, where a contractor is liable to provide a subcontractor with a safe place to work (Brief of Petitioner at 33 n.64) and comparative negligence principles apply, a contractor "cannot be held liable for an injury resulting from a danger which was obvious or which should have been observed in the exercise of ordinary care." Elder v. Pacific Telephone & Telegraph Co., 66 Cal. App. 3d 650, 661, 136 Cal. Rptr. 203, 208 (1977).

Albanese (a case which plainly dealt with negligence and not unseaworthiness as Respondent asserts).[21]

III

DUTY AND ASSUMPTION OF RISK ARE DIFFERENT CONCEPTS, AND RESPONDENT'S ARGUMENT IGNORES THE DISTINCTIONS WHICH HAVE BEEN DRAWN IN OPINIONS, COMMENTARIES AND THE RESTATEMENT

Respondent seeks to distort the rejected defense of assumption of risk so as to embrace in its rejection the whole notion of limits upon the conditions in which the defendant has a duty of affirmative action. He would thus confuse the foresight upon which the duty to exercise reasonable care is based with the actual events which could give rise to a defense of assumption of risk.

When not imposed by some positive rule, the duty of care ordinarily arises from foreseeability or expectation.[22] And in circumstances involving premises or chattels, as here, it is said to be based more particularly upon the defendant's having superior knowledge to that which the users may be expected to have or acquire,[23] and for this

---

[21]The case itself, quoted in full in Brief of Petitioner at 12, refutes the claim of Brief of Respondent at 38 that it did not deal with negligence. Respondent's further statement, at the same place, that the committees "denied comment on the negligence remedy" is patently untrue. They clearly commented on its principles and declined comment only upon its operation in "a particular actual setting". S. Rep. No. 92-1125, 92d Cong., 2d Sess. 10 (1972).

[22]2 F. Harper & F. James, The Law of Torts 1018 (1956).

[23]Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. Penn. L. Rev. 629, 634 (1952).

reason the question whether a hazard is one which is known or obvious has been critical in such cases. The importance of incorporating such guidelines in jury instructions has also been stressed.[24]

In addition to being subject to a vast area of exceptions where consent was not free, informed and deliberate,[25] the defense of assumption of risk, especially in the master-servant cases in which it originated,[26] was subject to an accumulation of mischievous and unjust doctrinal extensions, which this court recognized in its FELA jurisprudence[27] and which undoubtedly led to the severe restriction of the defense in such cases, since it had come to rest, as between employer and employee "in the context of our industrial society, upon a pure fiction."[28] Sometimes the injured employee was presented no realistic choice,[29] but usually his consent sprang from carelessness and so represented simply a special case of contributory negligence.[30]

---

[24]*Id.* at 641-42.

[25]W. Prosser, Law of Torts 447-52 (4th ed. 1971).

[26]Keeton, *supra*, at 636; Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 58-60 (1943).

[27]*See* Tiller v. Atlantic Coast Line R.R., 318 U.S. at 63-64 ("primary duty", "promise to repair", "simple tool", "peremptory order").

[28]318 U.S. at 69 (Frankfurter, J., concurring).

[29]This was so in The Arizona v. Anelich, 298 U.S. 110 (1936) and Beadle v. Spencer, 298 U.S. 124 (1936), in which this court rejected the bar of assumption of risk in Jones Act cases involving defective vessel appliances.

[30]"The great majority of the cases involving assumption of risk have been of this type . . . ." Restatement (Second) of Torts § 496A, Comment d. *See also* Keeton, *supra*, at 633: "Again, a court will frequently use assumption of risk to mean one type of contributory negligence . . . ." And thus this Court, after *The Arizona* and *Beadle*,

The distinction between the defendant's duty based upon foreseeability or superior knowledge and the defense of assumption of risk arising from the plaintiff's determination to proceed in the face of danger is clearly recognized in case law both before and since the 1972 Amendments.[31]

The Restatement recognizes this distinction and implements it fully in the structure of its sections, defining the duty of the occupier of the premises or the furnisher of chattels in such sections as 343, 343A and 388, and separately defining the defense of assumption of risk in sections 496A, *et seq.*, and especially section 496C. These sections are not simply the other side of the duty coin but introduce different considerations. The Restatement explains the duty this way:

> In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the condi-

---

recognized that, where a real choice was presented, the question was one of contributory negligence. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939).

[31]Owens v. Union Pacific R.R., 319 U.S. 715, 720 (1943) ("What in fact was absence of departure from due care by the defendant came to be labelled 'assumption of risk'") *citing* concurring opinion of Justice Frankfurter in Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 72 ("But 'assumption of risk,' in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law"); Riddle v. Exxon Transportation Co., 563 F.2d 1103, 1110 (4th Cir. 1977). Contrary to the argument in Brief of Respondent at 25-32, the Fifth Circuit cases have not condemned the Restatement or embraced Respondent's argument. Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977), directed the application of Restatement sections 343 and 343A as a proper way to avoid the application of assumption of risk. Wiles v. Delta S.S. Lines, Inc., 574 F.2d 1338 (5th Cir. 1978), never mentioned assumption of risk and merely remanded the case for reconsideration because it had been decided by the trial court before *Gay*.

> tions and dangers he will encounter if he comes. If he knows the actual conditions, the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.[32]

Section 496C, which deals explicitly with assumption of risk in connection with land or chattels, does not depend, as duty does, upon foreseeability and superior knowledge of the defendant, but upon the subjective understanding of the plaintiff and his voluntary acceptance of a risk, where the defendant actually has a duty because he could not have expected the plaintiff to discover it. Thus, the defense of assumption of risk has a function different from the concept of no duty.[33] The elements of the duty and the defense are sharply distinguished by the objective

---

[32]Restatement of Torts § 343A, Comment e.

[33]W. Prosser, Law of Torts 455 (4th ed. 1971) ("This duty does not coincide with those risks which the plaintiff does not in fact assume; rather it is based upon what the defendant can reasonably expect of him."); Keeton, *supra*, at 634 ("It will be noted that the defense of assumption of risk serves a purpose here, not served by the limitation of the defendant's duty. The defendant may be guilty of a breach of duty in failing to eliminate or give notice of a danger of which the visitor is not charged with notice. Even so, if the visitor should become aware of the danger no recovery will be allowed.")

character of the former and the subjective character of the latter.[34] Comment e to section 496C makes this clear:

> The duty is determined upon the basis of what the defendant should expect, while assumption of risk is a matter of what the plaintiff knows, understands, and is willing to accept.

The Restatement formulation is the outcome of a spirited scholarly battle in the 1960's[35] between those who would maintain the separate existence of the defense of assumption of risk and those who would dismantle it and "distribute it between the concepts of duty and contributory negligence."[36] One of the defeated generals has pointed out, however, that the difference between the prevailing Restatement view and his own is significant only in a narrow area with which we are not here concerned,[37] and it appears that both armies agree no duty is owed where the hazardous condition of the premises or chattel is known.[38]

---

[34]Keeton, *supra*, at 643 ("Certainly a test based on whether the defendant-occupier could reasonably expect the particular customer to discover and realize the danger is one that can be applied more easily and with fewer complications than a test which depends upon the state of mind of the plaintiff-customer and the justification which he asserts for not noticing or realizing a danger.")

[35]James, *Assumption of Risk: Unhappy Reincarnation*, 78 Yale L.J. 185, 188 (1968).

[36]W. Prosser, *supra*, at 454.

[37]James, *supra*, at 190.

[38]James, *supra*, at 189.

This Court has rejected assumption of risk in the employment context,[39] and has, we submit, never meant to raise up a duty of care and oversight where it did not exist or to make even an employer responsible to avoid ordinary risks of employment,[40] to say nothing of making a non-employer responsible for conditions he may reasonably assume are as well known to an independent contractor and his employees as to himself. And certainly there is no evidence that Congress wished to achieve such a result in 1972. Congress meant not to allocate new risks to the shipowner but, as Respondent acknowledges[41], simply referred to, acknowledged, and applied this Court's prior rulings on the subject.

IV

RESPONDENT HAS URGED OTHER MISCONCEPTIONS UPON THE COURT

A. Misconceptions of Petitioner's Position

Point D of Respondent's argument[42] seeks to make it appear that the shipowner would bar his recovery on the basis of a negligent act of his fellow servant. Having set up this straw man, Respondent easily knocks it down with

---

[39]Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943); The Arizona v. Anelich, 298 U.S. 110 (1936); Beadle v. Spencer, 298 U.S. 124 (1936); Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939).

[40]*See* concurring opinion of Justice Frankfurter in Tiller v. Atlantic Coast Line R.R., 318 U.S. at 72, and The Arizona v. Anelich, 298 U.S. at 122.

[41]Brief of Respondent at 23.

[42]Brief of Respondent at 34-36.

the *Edmonds* case.[43] But the shipowner makes no such contention, its argument being directed to whether the shipowner prospectively should have assumed a duty and not whether in retrospect the breach of such a duty was excused by the actual negligence of stevedore employees.

Respondent likewise misstates the shipowner's position by asserting, in his point F, that the shipowner urges a requirement of actual notice of danger.[44] Reference to points I.B and C of Petitioner's brief, and especially the latter, should instantly refute this notion. He also asserts, in point F, that the shipowner is asking for immunity from liability as the means of encouraging safety.[45] This, too, is untrue. The shipowner contends, as point II.A of its brief indicates, not for a rule of immunity but for a rule which fosters safety by declining to shift the full burden of injury to the shipowner in cases in which the stevedore, who is primarily and immediately responsible for safe operations, has proceeded in a conspicuously unsafe manner. Respondent, in contrast, offers no analysis to support his implication that the rule below promotes safety.

B. Misconceptions of Law and Economic Reality

In addition to Respondent's gross misconception as to the involvement of assumption of risk or contributory negligence (to which we respond in point III above), he has displayed in his point F several other misconceptions of law and economic reality, most notably in relation to the economic motivations and consequences of third-party ac-

---

[43]Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).

[44]Brief of Respondent at 38.

[45]Brief of Respondent at 41.

tions. He pretends that because the employer is always subject to liability for compensation, the employer's interest in safety remains a constant, regardless of the outcome of third-party suits,[46] ignoring completely that the proceeds of third-party suits, after attorneys' fees, are applied to reduce or eliminate the liability of the employer for compensation. He thus studiously ignores that, apart from the interest of lawyers, third-party suits represent a contest of shipowners, not primarily with longshoremen, but with their stevedore employers.[47] And when he cites with satisfaction the lower court's statement that its rule "will promote safety within a comparative negligence framework",[48] he must ignore, as did that court, its inability to compare the negligence of the party primarily responsible for safety—the stevedore employer.[49]

Respondent also asserts that third-party suits cannot undermine the security inherent in a compensation system,[50] ignoring that recoveries in such actions are paid in a lump sum in lieu of some or all future compensation and consist to a very large extent of attorneys' fees. He asserts at another point that Congress could have regulated attorneys' fees if it had desired to do so.[51] It has indeed tried to do so by regulating the fees recoverable in com-

---

[46]Brief of Respondent at 42-43.

[47]Of course, the shipowner is not the employer of the longshoreman as Respondent tries to imply (Brief of Respondent at 43).

[48]Brief of Respondent at 40.

[49]Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).

[50]Brief of Respondent at 41-42.

[51]Brief of Respondent at 44.

pensation proceedings and indicating that such proceedings are to be normal and third-party suits exceptional.[52] The significance of this subject is highlighted by the fact that it is not a union of longshoremen but a group of plaintiffs' lawyers which has filed an amicus brief in support of Respondent's position.

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the court should reverse the judgment of the Court of Appeals for the Ninth Circuit and thus restore the summary judgment entered by the district court and should also explicitly recognize the duty standard provided by land-based law for the guidance of lower courts in future cases.

Respectfully submitted,

GRAYDON S. STARING
Attorney for Petitioner

LEGROS, BUCHANAN, PAUL &
MADDEN
ROBERT H. MADDEN

LILLICK MCHOSE & CHARLES
EDWARD M. KEECH
Of Counsel

---

[52]"We are cognizant of Congress' concern that negligence suits under the Act too often inure to the benefit only of the attorney, thereby needlessly increasing the volume of litigation generated by the Act." Johnson v. Sioux City & New Orleans Barge Lines, Inc., No. 80-1450 (7th Cir. August 21, 1980), *cert. denied*, 49 U.S.L.W. 3351 (November 10, 1980) (No. 80-359).

Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

NO. 79-512

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner
v.
LAURO DE LOS SANTOS AND
SEATTLE STEVEDORE CO.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief Amici Curiae of Apex Marine Corp., Atlantic Richfield Company, American President Lines, Ltd., American Trading Transportation Company, Inc., Central Gulf Lines, Inc., Coastal Corporation, Columbia Transportation Division Oglebay Norton Company, Cove Shipping Inc., Delta Steamship Lines, Inc., Farrell Lines Incorporated, Hudson Waterways Corporation, Lykes Bros. Steamship Co., Inc., Ogden Marine, Inc., Prudential Lines, Inc., Sea-Land Services, Inc., Sea Train Lines, Inc., Transeastern Steamship Corporation, Trinidad Corporation, United States Lines, West Coast Shipping Company, Inc., Zapata Tankship, Inc. In Support Of Scindia Steam Navigation Co., Ltd., Petitioner

E. D. VICKERY
3710 One Shell Plaza
A.C. 713 224-8380
Houston, Texas 77002
Attorney for Amici Curiae

ROYSTON, RAYZOR, VICKERY & WILLIAMS
Of Counsel

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
CONSENT OF PARTIES	1
STATEMENT OF INTEREST	2
THE ULTIMATE ISSUE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	6
The Background	6
The Primary Congressional Concern	8
How Did Congress Approach Its Primary Safety Objective	10
The Accident	12
As Stevedore Is Independent Contractor, Shipowner Has No Duty To Supervise Its Operations	13
Stevedore Has Duty To Comply With Safety & Health Regulations For Longshoring	15
Proposed Rule Of Court Below Permits Stevedore To Disregard Safety Regulations	16
Congress Placed Primary Responsibility For Safety On Stevedore Under Land-Based Negligence Principles	18
When Only Stevedore Has Actual Knowledge Of The Condition, Imposing Liability On The Shipowner Defeats Congressional Goal Of Promoting Safety	20
Stevedore Assumes Risk Not The Longshoremen	23
As Congress Intended The Vast Improvements In Compensation Benefits Meet Needs Of Longshoremen	25
Blindfolding The Jury	27
Fifth Circuit Has Followed Congressional Safety Mandate	28
CONCLUSION	30
ADDENDUM A (Extracts from Deep Sea and Coastwise Longshore and Cotton Agreement, Texas Ports and the Port of Lake Charles, Louisiana, effective October 1, 1977 Terminating September 30, 1980, between West Gulf Maritime Association, Inc., and the South Atlantic and Gulf Coast District, International Longshoremen's Association, and affiliated deep sea locals from Lake Charles, Louisiana to Brownsville, Texas.)	A-1

Page

ADDENDUM B (Table Showing Effect of Assumed Escalation of Benefits of 7% Per Year for 50 Years) A-5

ADDENDUM C (Mathematical Calculations Of Spendable Income) A-7

ADDENDUM D (Extract From Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess. on S.2318, S.525 and S.1547) A-10

LIST OF AUTHORITIES

CASES Page

Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) 15

Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977) 18

Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977) 15, 28

Chavis v. Finnlines Ltd., O/Y, 576 F.2d 1072 (4th Cir. 1978) 15, 18

Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979) 15, 18

Cox v. Flota Mercante Grandcolombiano S.A., 577 F.2d 798 (2d Cir. 1978) 14, 18

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) 13, 17, 18, 20, 28

Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977) 15, 28

Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977), *cert. denied*, 435 U.S. 861 (1978) 15, 28

Hickman v. Jugoslavenska Linijska Providba Rijeka, Zvir, 570 F.2d 449 (2d Cir. 1978) 18

Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir. 1977), *cert. denied*, 434 U.S. 861 (1978) 14, 18

Italia Societa Per Azioni De Navigazione v. Oregon Stevedoring Company, Inc., 376 U.S. 315 (1964) 30

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) 19

Lubrano v. Royal Netherlands Steamship Company, No. 79-7228 (2d Cir., March 31, 1980) 14, 15

Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977) 18

Munoz v. Flota Mercante Grandcolombiana S.A., 553 F.2d 837 (2d Cir. 1977) 14, 18

Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979) 9, 14, 22

CASES

Page

Riddle v. Exxon Transp. Co., 563 F.2d 1103 (4th Cir. 1977) 14, 15, 18
Roberts v. Andrew Martin Sea Services, Inc., No. 78-2219 (5th Cir., May 30, 1980) 28
Ruffino v. Scindia Steam Navigation Co., Ltd., 559 F.2d 861 (2d Cir. 1977) 18
Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956) 7, 9, 12
Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 7, 9
Stockstill v. Gypsum Transportation, 607 F.2d 1112 (5th Cir. 1979), petition for cert. pending No. 79-1240 ..... 15, 28
Tipton v. Socony Mobil Oil Company, Inc., 375 U.S. 34 (1963) 27
United States v. Reliable Transfer, 421 U.S. 397 (1975) .. 17
Wescott v. Impressas Armadoras, S.A. Panama, 564 F.2d 875 (9th Cir. 1977) 15

UNITED STATES STATUTES

29 U.S.C.A. § 653(b)(2) 15
29 U.S.C.A. § 676 26
33 U.S.C.A. § 901ff 6
33 U.S.C.A. § 903(a) 11
33 U.S.C.A. § 905(b) 2, 6, 13
33 U.S.C.A. § 906 10
33 U.S.C.A. § 910 (f) and (g) 10
33 U.S.C.A. § 933 7
33 U.S.C.A. § 941 15

CODE OF FEDERAL REGULATIONS

29 C.F.R. § 1918.2(a) 15
29 C.F.R. § 1918.3(c) 16
29 C.F.R. § 1918.53(a)(5) 16, 21
29 C.F.R. § 1918.53(c)(1) 16, 21
29 C.F.R. § 1918.53(c)(2) 22
29 C.F.R. § 1918.91(c) 21

TEXTS

Restatement (Second) of Torts, Section 414 14

Page

MISCELLANEOUS

Compendium 1973, page 131 26
Hearings Before the Select Subcommitte on Labor of the Committe on Eduction and Labor, House of Representatives, 92d Cong. 2d Sess., on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023, page 106 8
Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess. on S. 2318, S. 525 and S. 1547, pages 307-310 29
The Report of The National Commission on State Workmen's Compensation Laws, 1972, page 56 26
H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 5, reprinted in 1972 U.S. Code Cong. and Ad. News 4698, at 4703 .... 7, 11, 29
H. Rep. at 1 and 4699 ..... 9, 25
H. Rep. at 6 and 4703 .....9, 12, 18, 21
H. Rep. at 7 and 4704 12
H. Rep. at 8 and 4705 16
S. Rep. No. 92-1125, 92d Cong., 2d Sess. 9 (1972) 7, 11, 29
S. Rep. at 2 .....8, 9, 15, 16, 25
S. Rep. at 10 .....9, 12, 18, 21
S. Rep. at 11 12

NO. 79-512

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner
v.
LAURO DE LOS SANTOS AND
SEATTLE STEVEDORE CO.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief Amici Curiae of Apex Marine Corp., Atlantic Richfield Company, American President Lines, Ltd., American Trading Transportation Company, Inc., Central Gulf Lines, Inc., Coastal Corporation, Columbia Transportation Division Oglebay Norton Company, Cove Shipping Inc., Delta Steamship Lines, Inc., Farrell Lines Incorporated, Hudson Waterways Corporation, Lykes Bros. Steamship Co., Inc., Ogden Marine, Inc., Prudential Lines, Inc., Sea-Land Services, Inc., Sea Train Lines, Inc., Transeastern Steamship Corporation, Trinidad Corporation, United States Lines, West Coast Shipping Company, Inc., Zapata Tankship, Inc. In Support Of Scindia Steam Navigation Co., Ltd., Petitioner

To The Honorable Judges Of Said Court:

CONSENT OF PARTIES

All of the parties in this case have given their written consent to the filing of this Brief *Amici Curiae* in support

of the Petitioner and such written consents have been filed with the Clerk.

STATEMENT OF INTEREST

Amici Curiae consist of twenty-one individual American steamship companies whose operations are worldwide. They are representative of all steamship companies who do business in the United States and therefore share a common exposure as third parties to personal injury and death claims by longshoremen and other harbor workers in the United States. They are involved in many lawsuits brought against them seeking damages under the new negligence action provided for by Congress in the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A. §905(b). Your Amici, therefore, are vitally interested in trying to see that the negligence rules adopted by the Court under the 1972 Amendments are fully consistent with the primary objectives of the Congress

(1) to promote safety

(a) by strengthening the stevedore employer's incentive to provide the fullest measure of on-the-job safety by requiring the stevedore to bear the economic costs of injuries which are caused by unsafe conditions for which the stevedore is responsible, and

(b) to require the shipowner to bear the economic costs of unsafe conditions for which it is responsible, and

(2) to provide fully adequate workmen's compensation benefits to meet the needs of the injured employee and his family.

As this is the first case in which the land-based negligence principles mandated by Congress to be used under

the 1972 Amendments have been before the Court, your Amici submit this Brief in the hope that it will be helpful to the Court in adopting those rules from land-based negligence law that will give full effect to these Congressional objectives.

THE ULTIMATE ISSUE

What rules of negligence law will best serve to accomplish the Congressional safety objective?

SUMMARY OF ARGUMENT

In its 1972 Amendments to the Longshoremen's Act, Congress sought to eliminate the injustices which had arisen under the Act because of the third party claims against shipowners by longshoremen for injuries sustained aboard vessels and the indemnity actions by shipowners against the stevedore employer of the longshoremen. The injustices included no increase in compensation benefits for 12 years, and had resulted in so many third party claims that it was an unacceptably expensive method of compensating longshoremen for their injuries.

Since longshoring was a high risk occupation, in extensively amending the Act in 1972 the primary Congressional concern was to provide "the fullest measure of on-the-job safety" for longshoremen. It sought to meet this concern in two ways: (1) By encouraging safety by making stevedore employers bear the cost of unsafe conditions by having to pay fully adequate compensation benefits, and by providing longshoremen a new cause of action for negligence against shipowners which was fairer to all concerned and would promote safety; and (2) By providing fully adequate compensation and medical benefits to the injured longshoreman and his family without their having to pursue the uncertainty of seeking damages from a third party.

The stevedore was in complete control of the cargo operations when a sack of wheat fell from a pallet ordered by the stevedore's gang foreman to be held suspended by the vessel's winch over the area in which Santos was ordered to work. Santos claimed the accident occurred because the winch brake would not hold the load, but only the stevedore had any knowledge of any problem with the winch.

The expert stevedore is an independent contractor and as the shipowner retains no control over the details of the stevedore's operations, under land-based negligence principles it has no duty to supervise the stevedore's operations.

The stevedore has the duty to comply with the Safety & Health Regulations for Longshoring. The proposed rule of the Court below permits the stevedore to disregard its affirmative duties to stop using the winch and to immediately report it to the shipowner and apparently to bear none of the cost of the injury. While the comparative fault rule would provide the strongest safety incentive for both shipowner and stevedore, this apparently is precluded by recent decisions of the Court.

Most of the Courts of Appeals have recognized that Congress placed the primary responsibility for the safety of the longshoremen on the stevedore as they are in the best position to eliminate the risk of injury. The proposal of the Court below that the shipowner's conduct be assessed under a "reasonable care under the circumstances" rule simply affords no standard by which judges and juries can assess the shipowner's conduct in the light of the "delicate balance" for safety which Congress mandated based on the most basic safety principle—the party who is responsible for an unsafe condition, has a duty to avoid it or to prevent an accident should pay for all the costs of any injuries which occur.

The result in the Court below imposes liability on the shipowner when only the stevedore had actual knowledge of the danger in the area under its control. The stevedore is the expert and has complete control over the operations and is in the best position to recognize and avoid any danger. Relieving the stevedore of the costs of this accident and making the shipowner pay the costs when it in fact had no knowledge of the danger and could not correct it utterly destroys the "delicate balance" for safety which Congress mandated.

This "delicate balance" for safety can be maintained in the area over which the stevedore has control only by placing it on the party who has the initial actual knowledge of an unsafe condition, and the duty either to stop work, to avoid it or to correct it. Until the shipowner has actual knowledge of such a condition in the stevedore controlled area, it is not in a position to eliminate a risk of injury of which it is in fact unaware.

It is the stevedore who assumes the risk of injuries, not the longshoremen. Until the shipowner breaches a duty owed to the longshoremen no question of assumption of risk or comparative negligence arises. The Court below did not appreciate that the shipowner has no control over the hiring of longshoremen, as it is controlled by gang foremen selected by his labor union. The Court below erroneously relied on the fiction that longshoremen face trouble if they refuse to work under dangerous conditions.

The vast improvement in compensation benefits have met the needs of longshoremen as Congress intended. From a maximum of $70 per week ($3,640 per year), the benefits have increased to the present maximum of $426.26 ($22,165.52 per year). If total and permanently disabled, a 41-year old longshoreman who lives 31 years, would receive approximately $2,263,834 in weekly payments. These exceed the amounts recommended by the

National Commission on State Workmen's Compensation Laws.

By withholding from the jury the full truth—all knowledge that all of an injured longshoreman's medical expenses have been paid and he has received weekly compensation up to $426.26 per week while recuperating from his injury—the courts create the false impression with the jury that the shipowner is the only party from whom the longshoreman can obtain compensation for his injuries, to the substantial prejudice of the shipowner.

The Court of Appeals for the Fifth Circuit has followed the Congressional safety mandate and achieved the "delicate balance" for safety which Congress desired. In doing so it has substantially reduced the number of third party cases, thus converting litigation costs into improved compensation benefits as Congress intended.

The Congressional safety objective can be achieved only by utilizing this basic safety rule as stated by the Court: "Liability should fall on the party best situated to adopt preventive measures and thereby reduce the likelihood of injury."

ARGUMENT

The Background

In 1927 Congress passed the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A. §901ff, (hereafter Longshoremen's Act) to provide workmen's compensation benefits for longshoremen employees injured in the course of their employment while working aboard vessels on navigable waters. The stevedore employer was made liable to pay compensation which was stated in the Act to be its exclusive liability to its longshoremen employees. 33 U.S.C.A. §905. Congress expressly preserved the right of employees to recover damages from third persons such as a vessel and its owners

who might be found liable for his injuries. 33 U.S.C.A. §933.

In its landmark decision in *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946), the Court held that longshoremen were entitled to recover under the general maritime law's liability without fault doctrine of unseaworthiness in addition to their rights under the general maritime law of negligence. At this time the stevedore employer's exclusive liability to his longshoremen employees still appeared to be the compensation benefits of the Longshoremen's Act.

However, the injustices being visited upon third party shipowners under the general maritime law's liability without fault doctrine of unseaworthiness for injuries which were really the fault of the stevedore, prompted the Court to provide shipowners with a cause of action implied from the contractual relationship between the shipowner and stevedore which permitted recovery of indemnity from the stevedore employer if the stevedore breached its implied warranty of workmanlike service. *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.,* 350 U.S. 124 (1956).

Ryan indemnity in turn visited injustices on stevedore employers who were held indirectly liable to their longshoremen employees for damages despite the apparent intent of Congress to make the stevedore's exclusive liability the compensation and medical benefits provided in the Longshoremen's Act. The longshoremen employees also suffered from this situation as the controversy over the injustices being done by the *Sieracki-Ryan* doctrines and how to resolve them resulted in preventing any monetary improvement in the benefits under the Act for over 12 years.[1]

---

1. S. Rep. No. 92-1125, 92d Cong., 2d Sess. 9 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 5, reprinted in 1972 U.S. Code Cong. and Ad. News 4698, at 4703.

The Primary Congressional Concern

While Congress was very much concerned about this unacceptably expensive method of compensating longshoremen for their injuries,[2] when it sought to correct it in making extensive amendments to the Longshoremen's Act in 1972, it was even more concerned about providing "the fullest measure of on-the-job safety" for longshoremen:

> "This consideration is particularly crucial with respect to high-risk occupations such as those covered by this Act. Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. *It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry,* and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a workmen's compensation system which maximizes industry's motivation to bring about such an improvement." (Emphasis supplied)[3]

---

2. A study made by counsel for your Amici covering third party claims in Gulf of Mexico ports from Texas to Florida for the years 1963 to 1967 involving approximately 1,500 claims indicated that approximately 45% to 50% of the cost of the claims went to attorneys representing longshoremen, shipowners and stevedores. Hearings Before the Select Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 92d Cong. 2d Sess., on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023, page 106.

3. S. Rep. at 2. Immediately after quoting this portion of the legislative history, the Court of Appeals for the Third Circuit stresses its importance thusly:

> "This component of the Act is of considerable importance in determining the scope of a vessel owner's duty toward the longshoreman. It is a reminder that the underlying purpose of the Act is to encourage safety on the waterfront within the framework of the relationship established between the stevedore on the one hand and the vessel owner on the other. Thus, in order to impose liability on the vessel owner under Section 905(b), we must be sure that it and not the stevedore is in the position

In amending the Longshoremen's Act in 1972, Congress had two primary purposes in mind insofar as the case presently before the Court is concerned:

1.

Safety—To Eliminate accidents with respect to the high risk occupations covered by the Longshoremen's Act to the maximum extent possible. It sought to accomplish the paramount safety objective by:

(a) Requiring employers to pay fully adequate workmen's compensation benefits to assure that the employer bore "the cost of unsafe conditions, (because this would) serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety,"[4] and

(b) providing a specified cause of action against third party shipowners based solely on negligence which "would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels"[5] than had been the result under the *Sieracki-Ryan* doctrines.

2.

Adequate Benefits—To the extent such accidents could not be eliminated, to provide fully adequate compensation and medical benefits to the injured employee and his family without their having to pursue the uncertainty of seeking damages from a third party.

---

best able to prevent similar accidents from arising in the future." Rich v. United States Lines, Inc., 596 F.2d 541, at 554 (3d Cir. 1979).

4. S. Rep. at 2; H. Rep. at 1 and 4699.

5. S. Rep. at 10; H. Rep. at 6 and 4703.

How Did Congress Approach Its Primary Safety Objective

In order to meet its primary safety objective, Congress made three principal changes with respect to liability for injuries and deaths to employees, their employers and the vessels on which they worked. The 1972 Amendments were a compromise between the interested groups—(1) employees (longshoremen and other harbor workers), (2) employers (stevedores, shipyards, etc.), and (3) third parties (shipowners, their vessels, etc.). Each received substantial "benefits" in return for relinquishing certain "rights" they had against one another:

1.

Vast improvements were made in the compensation benefits payable to covered employees and their beneficiaries. For example, the maximum weekly compensation rate was increased from a flat $70.00 per week to an annually adjusted maximum with increases as the national average weekly wage increased. The present maximum compensation rate is $426.26 per week, 33 U.S.C.A. § 906.[6] The Act's jurisdiction was extended

6. Thus, an employee who has an average weekly wage of $639.39 per week would be entitled to $426.26 per week ($22,165.52 per year) in compensation for total disability. Prior to the 1972 Amendment he would have been entitled to $70.00 per week ($3,640 per year). If he becomes totally and permanently disabled, his weekly compensation rate is increased on October 1st of each year by the same percentage the national average weekly wage has increased. 33 U.S.C.A. § 910 (f) and (g). Based on a 7% per year increase in the future (the 1973 thru 1979 increases averaged 7.11%), a longshoreman 40 years of age with a life expectancy of 31 years, entitled to the present weekly maximum of $426.26 would receive total weekly compensation benefits of $2,263,834. In the 31st year, his weekly compensation rate would be $3,247.00 per week and his total compensation for the year would be $168,844. Prior to the 1972 Amendments his benefits for the 31 years would have totaled $112,840 and he would have received the same $70.00 per week and $3,640 in the 31st year as he had received in the first year. All medical expenses, including related transportation, costs, were provided for in full for

ashore to those employees directly involved in "loading, unloading, repairing, or building" vessels where formerly dockside injuries were covered only by state compensation acts, 33 U.S.C.A. § 903(a).[7]

2.

In return for the vast improvements in compensation benefits and the extension of the Act's jurisdiction ashore, the rights of employees to recover damages from third party shipowners were changed, as follows:

(a) The 1972 Amendments eliminated the liability without fault doctrine of unseaworthiness as a basis for the shipowner's liability,[8] and

(b) Replaced maritime negligence as a basis for the shipowner's liability with a cause of action for negligence in which the shipowner is not to be held liable as a third party unless its negligence is such as would render

---

life prior to 1972. See more detailed discussion of these vast improvements in compensation benefits, *infra,* pages 25 to 28.

7. As many of the maritime states had maximum weekly compensation rates even lower than the Longshoremen's Act's $70.00 per week, the increase in benefits is even greater for these dock-side injuries.

8. "The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port." S. Rep. at 9; H. Rep. at 5 and 4703.

a land-based third party in non-maritime pursuits liable under similar circumstances.[9]

3.

In return for the elimination of the liability without fault unseaworthiness remedy and the replacement of maritime negligence with land-based negligence law, the shipowner was deprived of its implied contractual rights to indemnity from the employer under *Ryan*,[10] and written contracts agreeing to indemnify vessels for damages caused by the vessel's own negligence were declared to be void.[11]

The Accident

Longshoreman Santos was injured when some sacks of wheat fell from a pallet which was being held suspended by the vessel's winch over the area in the cargo hold where Santos had been ordered by the stevedore's gang foreman to clean up some sacks which had been spilled from the

---

9. "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called such as unseaworthiness, non-delegable duty, or the like." S. Rep. at 10; H. Rep. at 6 and 4703.

10. Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956).

11. "The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker." S. Rep. at 11; H. Rep. at 7 and 4704.

pallet some ten minutes earlier.[12] Santos claimed that the brake on the electric winch would not hold the load in place after it was suspended over the men. Only the stevedore and its longshoremen had any knowledge that the winch brake would not hold the load. Santos sought to impose liability on the shipowner claiming it should have discovered the problem with the winch brake and corrected it.

As Stevedore Is Independent Contractor, Shipowner Has No Duty To Supervise Its Operations

The contractual relationship of the stevedore to the shipowner is that of a true independent contractor under land-based negligence principles.[13] The stevedore is given control of those areas of the vessel and its equipment which are needed by it and the stevedore has the complete supervision and control of all the cargo operations.[14]

---

12. The sacks remaining on the pallet after some had been spilled on the deck were in a state of disarray and the pallet could have been placed on or suspended over the main deck or removed to the dock by the stevedore which would have eliminated any risk of the sacks falling on Santos in the vessel's cargo hold. The stevedore's gang foreman was in complete control of the cargo operations as control of this area had been turned over to the stevedore and he alone made the decision to require Santos and the other longshoreman to work with the pallet with its sacks in disarray suspended over their heads.

13. As the Court recognized in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, at 263-266 (1979), Section 905(b) expressly recognized the fact that some shipowners hire longshoremen direct from labor unions and do not use an independent contracting stevedore. In such direct employee situations, however, the working relationship between the shipowner's employees who are members of the crew of the vessel and the shipowner's employees who provide stevedoring services to the vessel is the same as it is where an independent contracting stevedore is used. Thus, when we address the shipowner's duty in the present case, we address the duty of the vessel's crew members where the shipowner employs its stevedoring personnel direct.

14. This is confirmed by the terms of the contracts with the various longshoremen's unions which reserve these cargo operations to the unions and thus prohibit the crew of the vessel from doing any of

A shipowner hires the stevedore as an expert in loading and unloading vessels and to furnish the necessary stevedoring gear for the cargo operations because none of the ship's crew are stevedores. In discussing the question of control under land-based negligence principles of Section 414 of the Restatement (Second) of Torts, the Court of Appeals for the Third Circuit recognizes that the shipowner does not retain any control of the stevedore's methods of work or the operative details of the cargo operations:

> "Comment c to section 414 indicates that the 'ultimate control' over stevedoring operations retained by a shipowner is not the sort of control to which section 414 is directed:
>
> > . . . It is not enough that he (shipowner) has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports . . . Such a general right is usually reserved to employers (shipowner), but it does not mean that the contractor (stevedore) is controlled as to his methods of work, or as to operative detail." *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, at 1251 (3d Cir. 1977).

The Third Circuit therefore correctly held that

> ". . . using the shipowner's ultimate control in order to create a duty of supervision would amount once again to the establishment of a nondelegable duty. As we have declared above, this is what Congress sought to proscribe by enacting amended section 905(b)." 554 F.2d at 1251.[15]

---

this work. A typical example of these contractual reservations is reprinted in Addendum A, *infra*, p. A-1 to A-2.

15. Accord: Lubrano v. Royal Netherlands Steamship Company, No. 79-7228 (2d Cir., March 31, 1980); Cox v. Flota Mercante Grandcolombiano S.A., 577 F.2d 798, at 801 (2d Cir. 1978); Munoz v. Flota Mercante Grandcolombiana S.A., 553 F.2d 837, at 840 (2d Cir. 1977); Rich v. United States Lines, Inc., 596 F.2d 541, at 550 (3d Cir. 1979); Hurst v. Triad Shipping Co., 554 F.2d 1237, at 1251 (3d Cir. 1977), *cert. denied*, 434 U.S. 861 (1978); Riddle v. Exxon

Stevedore Has Duty To Comply With Safety & Health Regulations For Longshoring

Congress recognized that the Safety & Health Regulations for Longshoring were a very vital part of its safety plan when it called for "vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970."[16] These Safety Regulations for Longshoring spelled out in detail, both then and now, what Congress expected of stevedore employers. As many courts have held,[17] these regulations themselves make it abundantly clear that it is the stevedore—not the shipowner—who has the duty to comply with these regulations:

> "The responsibility for compliance with the regulations is placed upon 'employers' as defined in § 1918.3(c)." 29 C.F.R. § 1918.2(a).

Transp. Co., 563 F.2d 1103, at 1113 (4th Cir. 1977); Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030, at 1034 (5th Cir. 1977), *cert. denied,* 435 U.S. 861 (1978); Wescott v. Impressas Armadoras, S.A. Panama, 564 F.2d 875, at 883 (9th Cir. 1977).

16. S.Rep. at 2. The term "Maritime Safety Amendments of 1958" refers to Public Law 85-742, Act of August 23, 1958, Longshoremen's & Harbor Workers' Safety Program which amended Section 41 of the Act, 33 U.S.C.A. § 941, in 1958 to authorize the Secretary of Labor to promulgate safety regulations for longshoring and other maritime employments. The first Safety & Health Regulations for Longshoring became effective on March 21, 1960. The Occupational Safety & Health Act of 1970 simply deemed the regulations for longshoring under 33 U.S.C.A. § 941 (Act of August 23, 1958) to be issued under the 1970 Act until superseded by corresponding standards under the 1970 Act, 29 U.S.C.A. § 653 (b)(2). The longshoring regulations in effect today are still issued pursuant to 33 U.S.C.A. § 941, as no superseding standards have been issued.

17. Chavis v. Finnlines Ltd., O/Y 576 F.2d 1072 (4th Cir. 1978); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979); Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1977), *cert. denied,* 435 U.S. 934 (1978); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977); Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364 (2d Cir. 1978); Stockstill v. Gypsum Transportation, 607 F.2d 1112 (5th Cir. 1979), petition for cert. pending No. 79-1240.

> "The term 'employer' means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments. . . ." 29 C.F.R. § 1918.3(c).

At a minimum Congress recognized that unless the stevedore was made to bear the cost of injuries to longshoremen which are caused by the stevedore's failure to comply with the safety regulations, its expressed desire that "every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry" would be thwarted.[18]

Proposed Rule Of Court Below Permits Stevedore To Disregard Safety Regulations

Under the proposed rule of the Court below, the stevedore and Santos claim that the stevedore should bear none of the cost of the injury in this case even though it (1) actually knew the winch brake was not holding the loads properly for two days prior to the injury, (2) had utterly and completely failed to comply with its affirmative duty to eliminate the risk of injury under the following two separate Safety & Health Regulations for Longshoring:

> "Any defect or malfunction of winches *shall be reported immediately* to the officer in charge of the vessel." (Emphasis supplied) 29 C.F.R. § 1918.53(a)(5).

and

> "When the electromagnetic or other service brake is unable to hold the load, *the winch shall not be used.*" (Emphasis supplied) 29 C.F.R. § 1918.53(c)(1).[19]

---

18. S. Rep. at 2 and 12; H. Rep. at 8 and 4705.

19. Compliance by the stevedore with these two regulations is absolutely essential. The alternative would require a vessel's officers to be clairvoyant, since a winch brake that is unable to hold a load

and (3) ordered the longshoremen to work under a pallet suspended over their heads with sacks of cargo already in disarray, one of which fell and caused the injury.

Thus if the stevedore avoids injury to its longshoremen long enough for a judge or jury to say the shipowner should have discovered an unsafe condition, the stevedore's safety incentive is completely removed as apparently it will bear none of the costs of the injury as Congress intended. The stevedore may even be rewarded for its negligence by recovering from the vessel the full amounts it has paid in compensation and medical benefits while the third party action has been pending.[20]

Quite obviously, in cases involving injuries to longshoremen some comparative fault rule such as the one adopted by the Court for vessel collision cases in *United States v. Reliable Transfer,* 421 U.S. 397 (1975) or the one which was proposed in *Edmonds* that the shipowner pay only the percentage of the damages attributable to its fault, would provide the strongest safety incentive for both the shipowner and the stevedore. But the Court rejected any such proportionate fault rule in *Edmonds* because it was concerned that it "might knock out of kilter this

---

is not readily observable except to the winch operator. Even longshoremen in the hold cannot discern whether the erratic behavior of a draft of cargo is caused by a defective winch or improper winch operation. This situation is rendered even more complex by the natural human reaction, shared even by winch operators, to blame alleged malfunctioning machinery rather than human error for improper operation.

20. In view of the Court's recent decision in *Edmonds v. Compagnie Generale Transatlantic,* 443 U.S. 256 (1979), the negligent stevedore may be expected to claim full reimbursement of its compensation and medical expenses from the shipowner. *Edmonds* does not address the issue of whether a negligent stevedore may recover the compensation and medical expenses it has paid, so the issue is an open one. However, there can be no doubt that the negligent stevedore in this case will seek such a full recovery in the same fashion as did the 70% negligent stevedore in *Edmonds.*

delicate balance" for safety which Congress had struck in dealing with the rights and liabilities of stevedores, shipowners and longshoremen in third party cases against shipowners in the 1972 Amendments.[21]

Congress Placed Primary Responsibility For Safety On Stevedore Under Land-Based Negligence Principles

Most of the Courts of Appeals have recognized that Congress thus placed the primary responsibility for the safety of longshoremen on their stevedore employers, and when the stevedore has been in a better position to eliminate the risk of injury than the shipowner, the Courts have declined to impose a duty on the shipowner which would relieve the stevedore of its obligation to bear the cost of an injury as Congress intended by paying compensation under the Longshoremen's Act.[22]

Despite the clarity of the Committee Reports that in a third party action the longshoreman is to be put in the the "same position he would be if he were injured in non-maritime employment ashore" and that the 1972 Amendments were "not to endow him with any special maritime theory of liability,"[23] the Court of Appeals below adopts

---

21. Edmonds v. Compagnie Generale Transatlantica, 443 U.S. 256, at 273 (1979).

22. Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979); Hickman v. Jugoslavenska Linijska Providba Rijeka, Zvir, 570 F.2d 449 (2d Cir. 1978); Cox v. Flota Mercante Grancolombiana S.A., 577 F.2d 798 (2d Cir. 1978), *cert. denied*, 439 U.S. 881 (1978); Munoz v. Flota Mercante Grancolombiana, S.A., 553 F.2d 837 (2d Cir. 1977); Ruffino v. Scindia Steam Navigation Co., Ltd., 559 F.2d 861 (2d Cir. 1977); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir. 1977), *cert. denied*, 434 U.S. 861 (1978); Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977); Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977); Riddle v. Exxon Transportation Co., 563 F.2d 1103 (4th Cir. 1977); Chavis v. Finnlines Ltd., O/Y, 576 F.2d 1072 (4th Cir. 1978).

23. S. Rep. at 10; H. Rep. at 6 and 4703.

this Court's maritime theory of liability as set out in *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959), and labels it the "reasonable care under the circumstances" standard, 598 F.2d at 486. As to any unsafe condition aboard a vessel which causes injury, whether the responsibility of the shipowner or the stevedore, which a judge or jury finds (1) should have been discovered by the shipowner, (2) which the shipowner should recognize as involving an unreasonable risk of harm to a longshoreman, and (3) as to which the shipowner fails to exercise reasonable care to protect the longshoreman imposes liability on the shipowner for all of the costs of the injury. The problem with this "standard" is that it is no standard at all. It permits each judge and each jury to determine who owes what duty and to whom and thus completely frustrates the Congressional safety objective. It makes the shipowner liable for unsafe conditions of which it has no actual knowledge, and therefore does not know anything needs to be done. It completely exonerates the stevedore who does nothing when it has actual knowledge, when it is the only party who knows anything needs to be done and moreover is the only party in a position to eliminate the risk prevailing in the area over which the stevedore has control. Indeed, in this case, it exonerates the stevedore who was negligent per se for violating the Safety & Health Regulations for Longshoring simply if a judge or jury thinks that's a proper result. Thus, if a judge or jury concludes the shipowner ought to have discovered it at any time within a matter of a few hours after it became defective, the safety incentive Congress gave to the stevedore is removed as the stevedore knows it will not have to bear the costs of any injuries and can completely ignore the safety regulations, as it did here for two days prior to the accident.

When Only Stevedore Has Actual Knowledge Of The Condition, Imposing Liability On The Shipowner Defeats Congressional Goal Of Promoting Safety

The result in the Court below imposes liability on the shipowner when the stevedore was the one party which actually knew of the danger in the area under its control and the shipowner merely might have discovered it. Whatever purpose might be served in other cases by making a party without actual knowledge liable, it is undisputed that the one party who in fact knew of the danger had the only real opportunity to avoid the accident. The stevedore is the expert who knows whether the condition is a danger or simply an inconvenience. It has complete control over its own employees and the cargo operations and is in the best position to recognize and avoid any danger. Relieving the stevedore of its obligations to pay the costs of this accident, by making the shipowner pay the costs when it in fact had no knowledge of the danger and could not correct it, utterly destroys the "delicate balance" for safety which the Court has already recognized Congress sought to establish in *Edmonds,* 443 U.S. at 273.

The only way this "delicate balance" for safety can be maintained in the area over which the stevedore has control is to place squarely on the party who has actual knowledge of an unsafe condition, the duty either (1) to stop work to avoid it, or (2) to correct it. The present case is a classic example of the need for just such a rule —only the stevedore had actual knowledge of the unsafe condition in an area over which it had control which resulted in the injury—the pallet, with its sacked cargo in disarray, suspended over the area where the longshoremen were ordered to work by the stevedore and the brakes on the winch allegedly not holding the loads.

Only the stevedore had specific duties imposed by law. It was both the only party and the one in the best position to eliminate the risk of injury (1) by placing the pallet on the vessel's main deck or the dock so the longshoremen would not be exposed to any danger as they picked up the spilled sacks in the hold, or (2) by not using the winch [29 C.F.R. 1918.53(c)(1)], or (3) by reporting the malfunction of the winch immediately to the officer in charge of the vessel [29 C.F.R. § 2918.53(a)(5)] so he could arrange for its repair, or (4) by repairing the winch itself.[24]

Until it has actual notice of an unsafe condition in the area over which the stevedore has control, the shipowner obviously is not in a position to eliminate a risk of injury of which it in fact is unaware.[25]

To insure that at least one of the parties has the Congressional safety incentive (knows that it must bear the cost of injuries) at all times, that party who has actual

---

24. Neither the expert stevedore nor the individual longshoremen suffer any economic loss as a result of any delays resulting from such action by the stevedore as such costs are borne by the shipowner.

25. The oil spill example in the Committee Reports, S. Rep. at 10; H. Rep. at 6 and 4704, is the part usually relied on to urge that constructive knowledge is all that is needed. This may be the proper approach if the oil spill is in an area over which the shipowner has retained actual control, but it clearly is not if the oil spill is in the area under the control of the stevedore. Surely no one would seriously contend that if the oil was spilled by the stevedore in an area under its control, where the stevedore has the duty to clean it up under the Safety Regulations [29 C.F.R. 1918.91(c)] that constructive (or even actual) knowledge of the shipowner should make it bear the cost of any injury to a longshoreman. Certainly not, if the stevedore is to be given the maximum "incentive to provide the fullest measure of on-the-job safety," by being made to bear the cost of such injuries. In any event, there can be no doubt that the "delicate balance" for safety which Congress intended to establish is of paramount importance. To the extent the constructive knowledge concept is inconsistent with or detrimental to the establishment of this "delicate balance" for safety, it clearly must yield to that which furthers the Congressional objective.

knowledge of an unsafe condition in the area under the stevedore's control should have the duty to eliminate the risk of injury. In this case that is the stevedore, and unless it bears the cost of this injury by paying the compensation benefits provided by Congress, it will have no reason to comply with the Safety Regulations or to improve its on the job safety practices as Congress mandated.[26]

---

26. While it clearly is not the situation in this case as the shipowner had no actual knowledge, assuming the stevedore had complied with its obligations to both the shipowner and the longshoreman under the safety regulations by stopping work and reporting the condition of the winches to the vessel's officer, so that both parties had actual knowledge of their condition, what rules should the Court adopt to establish and promote the "delicate balance" for safety between the shipowner, stevedore and longshoreman which Congress directed? Because of the stevedore's superior opportunity to control working conditions and avoid the accident, knowledge by the shipowner is not enough to impose liability; there must also be a duty to act. See, *Rich v. United States Lines, Inc.*, 596 F.2d 541, 552-556 (3d Cir. 1979). Thus, when both have actual knowledge of an unsafe condition in the area under the stevedore's control, the party (vis-a-vis the shipowner and stevedore) who has the duty to correct or eliminate the unsafe condition should be burdened with the Congressional safety incentive, that is, be made to bear the cost of any injury. In this case, if the shipowner had actual knowledge and if it was the control points on the winch, the duty to repair would have been the shipowner's since the safety regulations do not permit the stevedore "to tamper with or adjust electric control circuits" [29 C.F.R. § 1918.53(c)(2)], but if it was the brake as the winch operator testified, both the record and regulations are silent as to which had the duty to repair. However, as with other unsafe conditions it would normally be a simple matter to establish who (vis-a-vis the shipowner and stevedore) had the duty to correct or eliminate the risk of injury. Of course, the principal guide should be the Safety Regulations which affirmatively set out the responsibilities of the stevedore. They are the safety rules Congress recognized and clearly wanted applied. While these regulations expressly do not place "additional responsibilities or duties" on shipowners, they likewise expressly do not relieve shipowners of duties and responsibilities placed on them by law, regulations or custom. Thus, by proof the parties are free to establish any adjustment of their respective duties between themselves by custom or agreement.

Stevedore Assumes Risk Not The Longshoremen

In placing the primary safety responsibility on the stevedore, Congress obviously recognized that all risks of injury which were the responsibility of the stevedore would have to be "assumed" by the stevedore and therefore provided for compensation benefits at an unprecedentedly high level. The admiralty doctrines of comparative negligence and no assumption of the risk have no application where the risk of injury is the stevedore's responsibility for which Congress intended it to pay. It is only after the shipowner has been found to have negligently breached a duty owed to the longshoremen that these two doctrines come into play to require the shipowner to pay damages, except those attributable to the longshoreman's own comparative negligence. That the Court below failed to appreciate this fact is evident from its expressed belief, that longshoremen "face trouble for delaying work" and therefore "we cannot accept the idea that an injured longshoreman cannot recover because he should have demanded that the stevedore halt further loading operations until the stevedore could arrange to improve the working conditions." 598 F.2d at 488. He can and should recover from his stevedore employer as Congress mandated for it is the stevedore alone he must face, if he delays the work in an attempt to get the stevedore to stop work as the safety regulations require! Whatever, if any, inhibitions a longshoreman may have about refusing to work under unsafe conditions have to come from his fear of not being re-employed by the stevedore's gang foreman who picked him up at a labor union shape-up or hiring hall for that day's work—not the shipowner by whom he has never been and probably never will be employed.[27] The risk of injury

27. The shipowner did not hire him and it could not discharge him—only the stevedore could do that. The shipowner could dis-

he may be said to "assume" for this reason therefore is the sole responsibility of the stevedore—not the shipowner—and, as Congress intended, it is only right that he must look to the stevedore to bear the cost of any injury he thus sustains. The stevedore ordered him to work under the suspended pallet with its sacked cargo in disarray—not the shipowner. When he hired out that day to the stevedore, the risk he may be said to have "assumed" was that his stevedore employer might force him to work under unsafe conditions unless he was prepared to demand that the stevedore stop work until the unsafe conditions had been corrected—a risk the shipowner had nothing to do with.

Unless the Court recognizes these factors, the "delicate balance" for safety which Congress sought to achieve will be but an idle dream.[28]

---

charge the stevedore, but not the individual longshoremen. And the Courts of Appeals who have concluded that individual longshoremen "face trouble for delaying work" in the face of unsafe working conditions are living in the far distant past and are taking judicial notice of facts which have no relationship to reality. Some of the most powerful labor unions in the United States represent longshoremen, and they diligently protect their members from unsafe working practices by stevedores and shipowners alike. A stevedore who tries to make trouble for a longshoreman who refuses to work under unsafe conditions will quickly find that longshoreman's labor union not only preventing it, but going so far as to refuse to furnish any longshore labor to that stevedore if necessary to prevent it. This fiction—that the longshore labor unions do not vigorously protect their members from any such 'trouble" from stevedore employers—is just that—fiction, and has not the slightest iota of reality to it. When the shipowner hires the longshoreman as a direct employee, the situation is no different—the longshoreman gets his job through his labor union by being picked up by a gang foreman who has been placed in that position by the labor union. See Addendum A, *infra*, p. A-2 to A-5, for some contractual provisions relating to Gang Foremen.

28. It is in fact somewhat of a misnomer to ever say a longshoreman is being made to "assume" the risk of an injury—even if his own negligence was the sole cause of his injury, he always receives the very generous compensation benefits provided under the Act.

As Congress Intended The Vast Improvements In Compensation Benefits Meet Needs Of Longshoremen

A very important part of this "delicate balance" is the improvement in compensation benefits which were made by Congress in the 1972 Amendments because they

> ". . . are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety."[29]

That Congress made the benefits at the very least adequate to meet the needs of longshoremen and their families can be quickly seen by comparing a few of the present benefits with those prior to the 1972 Amendments:

	Prior 1972	After 1972 Amendments
Maximum Compensation Rate	$70.00 per week = $3,640 per year	$426.26 per week = $22,165.52 per year
Permanent Total Disability (41 year old man with life expectancy of 31 years)	$70.00 per week for 31 years = $112,840	$426.26 per week escalated Oct. 1 each year for 31 years = $2,263,834.[30]
Permanent Partial Loss of Wages	2/3rds of wage loss limited to maximum of $70 per week ($3,640 per year) with a lifetime maximum of $24,000.	2/3rds of wage loss up to maximum of $426.26 per week[31] ($22,165.52 per year) with no lifetime maximum amount.

29. S. Rep. at 2; H. Rep. at 1 and 4699.

30. See Addendum B, *infra*, p. A-5 to A-6 for table showing annual effect of an assumed escalation of 7% per year. Upon the man's death, even if unrelated to the injury, his widow is entitled to 75% of the weekly rate. Thus, if this hypothetical longshoreman died while still 41 years of age, his widow would receive $1,697,875 over this 31-year period. If there is one other beneficiary, the full weekly benefit would be payable.

31. Such compensation is adjustable as the weekly maximum of $426.26 is subject to being increased on October 1 of each year as the national average weekly wage increases.

The adequacy of these weekly benefits is further demonstrated by the fact that they exceed those recommended by the National Commission on State Workmen's Compensation Laws.[32] The National Commission recommended that weekly benefits be based on 80% of an employee's spendable weekly earnings. (Gross earnings less federal income taxes and social security taxes.)[33] An employee (married with two children) who is entitled to the maximum $426.26 per week receives 86.3% of his spendable earnings. A single person receives 97.6%.[34] Each longshoreman also has to pay a percentage of his earnings as "service charges" or "dues" to his labor union, which are not spendable income any more than are income or social security taxes. As he does not have to pay such union dues out of his compensation benefits, when this factor is considered the married employee with two children receives 91% and the single employee receives 103.6% of their pre-injury spendable income.

Even a permanently partially disabled longshoreman who is being compensated for his partial loss of wages receives a higher percentage of his spendable earnings than the 80% recommended. For example, assuming a 40% loss of wages the married employee with two children would have 100.7% of his pre-injury spendable earnings and the single employee 107.4% of his.

---

32. In connection with its passage of the Occupational Safety & Health Act of 1970, Congress established the National Commission on State Workmen's Compensation Laws to 'undertake a comprehensive study and evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation." 29 U.S.C.A. § 676.

33. The Report of The National Commission on State Workmen's Compensation Laws, 1972, page 56; Compendium, 1973, page 131.

34. See Addendum C, *infra*, page A-7 to A-9, for the mathematical calculations by which all of the percentages of spendable income in this and the next succeeding paragraphs were obtained.

These are by no means all of the improvements in benefits made in the 1972 Amendments,[35] but they are sufficient to demonstrate that the second Congressional purpose has been achieved—to the extent accidents cannot be eliminated, it has provided fully adequate compensation and medical benefits for the longshoremen and their families without their having to pursue the uncertainty of seeking damages from a third party.

Blindfolding The Jury

Based in large part on this Court's decision in *Tipton v. Socony Mobil Oil Company, Inc.*, 375 U.S. 34 (1963) most courts have denied the jury knowledge of the fact that an injured longshoreman has had all of his medical expenses paid, and has been paid very generous benefits now provided under the Act, and that he will continue to be compensated in the future for any permanent disability. This has been done on the theory that this evidence is prejudicial to the injured employee's case against the shipowner. The courts are thus blindfolding the jury, and are requiring the jury to assess the shipowner's conduct with the completely false belief that the injured longshoreman employee has had to rely on charity or fend for himself while recuperating from his injuries, sometimes for years.[36] The prejudice and injustice to the

35. The cost of these improvements in benefits is not insignificant. In New York a stevedore now pays $84.80 per hundred dollars of payroll for coverage under the Act and in Texas, the stevedore pays $51.69 per hundred dollars of payroll. As stevedores derive their income from shipowners, this cost is obviously borne in the end by shipowners.

36. On the damage issue alone, the jury is not even permitted to know that he has been receiving as much as $22,000 a year in compensation, tax free, and will continue to do so as long as he is disabled, for whatever weight they might care to give it in evaluating his possible motive for not having returned to work or to less than full time employment. When the medical evidence on the extent of his physical disability is in conflict, as it almost always is, surely a jury is entitled to have any information which would help them in evaluating the extent of his physical disability and his damages.

shipowner is obvious when the jury is led to believe that he has had no income from any source, has had to pay all of his own medical bills, and will not be compensated by anyone for his past or future losses unless the jury finds the shipowner liable. Whatever the wisdom or justice, if any, of this rule may have been in the past when the compensation rate was $70 per week, it no longer exists when the rate is over $400 per week tax free, and his potential benefits run into the hundreds of thousands of dollars.

To the extent juries are to assess the shipowner's conduct in a given factual situation, they should have all the facts, for indeed this is the most fundamental tenet of our jury system—given the full truth—not just part of it—a jury will provide equal justice to all.[37]

Fifth Circuit Has Followed Congressional Safety Mandate

The Court of Appeals for the Fifth Circuit has followed the Congressional safety mandate by declining to find a shipowner liable as a third party under the Act when the injuries have really been the fault of the stevedore and the stevedore has been in the best position to eliminate the risk of injury.[38] Such an approach has

37. In *Edmonds* the Court stated: "In many cases, of course, the shipowner whose act or omission contributed only a very small percentage of the total negligence will avoid liability on the ground of lack of causation." 443 U.S. at 256, footnote 15. If the Court continues to approve this blindfolding of the jury, which creates the impression that the shipowner is the only source from which the longshoreman will be paid for his injuries, the Court's statement will remain insupportable.

38. Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977); Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977); Stockstill v. Gypsum Transportation, 607 F.2d 1112 (5th Cir. 1979), petition for cert. pending No. 79-1240; Roberts v. Andrew Martin Sea Services, Inc., No. 78-2219 (5th Cir., May 30, 1980).

accomplished the "delicate balance" for safety which Congress desired. It has also reduced the impact of third party longshore cases on the federal courts and has used the financial resources of stevedores and shipowners "to pay improved compensation benefits" which prior to the 1972 Amendments were "being spent to defray litigation costs."[39] This is demonstrated in part by what has occurred in the United States District Court for the Southern District of Texas. In fiscal year 1971, of 499 marine personal injury cases filed in the district, 237 or 47.5% of them were third party cases by employees covered by the Longshoremen's Act.[40] In fiscal year 1979, only 306 marine personal injury cases were filed and of these only 30 or 9.8% were by Longshoremen's Act employees.[41] Numerically, there were 193 fewer marine personal injury cases filed in 1979 than in 1971. As there were 207 fewer Longshore Act cases in 1979, it is obvious that substantially all, if not all, of the 38.7% reduction in the Southern District's case load of marine personal injury cases from 1971 to 1979 was a direct result of the 1972 Amendments and the adoption by the Fifth Circuit of those principles of land-based negligence law which achieve the "delicate balance" for safety between shipowners, stevedores and longshoremen that Congress mandated. The adequacy of the vastly improved compensation benefits has undoubtedly been a contributing factor also, because third party actions are no longer needed to replace a longshoreman's economic loss as they were when

---

39. S. Rep. at 9; H. Rep. at 5 and 4702.

40. Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess. on S. 2318, S. 525 and S. 1547, pages 307-310. See Addendum D, *infra*, pp. A-10 to A-13 in which these pages from the Senate Hearings are reprinted and which explain how these figures were obtained under the supervision of counsel for your Amici.

41. These figures for 1979 were obtained in the same manner as those for fiscal year 1971. See Addendum D, *infra*, pp. A-10 to A-11.

the maximum weekly compensation rate was $70.00 per week prior to the 1972 Amendments.

CONCLUSION

Many decisions have been rendered dealing with the shipowner's negligence liability under the 1972 Amendments. The ones that have achieved the "delicate balance" for safety which Congress mandated have done so by applying a basic safety principle which was first stated and applied to this shipowner-stevedore relationship by the Court thusly:

> " * * * that liability should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not." *Italia Societa Per Azioni De Navigazione v. Oregon Stevedoring Company, Inc.*, 376 U.S. 315, at 324 (1964).

Your Amici respectfully submit that the Congressional safety objective can only be achieved by utilizing this principle to the fullest.

Respectfully submitted,

E. D. VICKERY
3710 One Shell Plaza
Houston, Texas 77002
A.C. 713 224-8380
Attorney for Amici Curiae

ROYSTON, RAYZOR, VICKERY & WILLIAMS
Of Counsel

ADDENDUM A

Extracts from
Deep Sea and Coastwise Longshore and Cotton Agreement, Texas Ports and the Port of Lake Charles, Louisiana, effective October 1, 1977 Terminating September 30, 1980, between West Gulf Maritime Association, Inc., and the South Atlantic and Gulf Coast District, International Longshoremen's Association, and affiliated deep sea locals from Lake Charles, Louisiana to Brownsville, Texas.

GENERAL RULES GOVERNING WORK

Rule 20. Longshore Work

Longshore work shall constitute the loading and discharging of all sea-going vessels, railroad cars at wharf, fitting ships for grain, livestock, building magazine rooms or securing cargoes of any kind, dismantling ships of any kind of fittings, shifting of cargoes, coal or coke, and all labor connected with the loading and discharging of ships, including hoisting cargoes with ships' winches, also including dinkey or jitney drivers, and loading of ship's stores except when store are loaded by ship's crew and except at ports where longshoremen are not available. Longshore labor also includes all men who truck cargo direct to and from pile or car to or from the ship's side to hatches. The important distinction being whether or not the freight is handled once, that is to say, laid down or piled. It is mutually agreed when assorting is necessary when discharging the employment of warehouse labor is optional.

When vessel is in loading or unloading berth, or shifting between loading or unloading berths within the con-

fines of a port, the loading and laying of dunnage and the opening and closing of hatches when in connection with the handling of general cargo and/or cotton, is longshore work and will not be done by ship's crew.

The Employers reserve the right to determine by name from a list furnished by the Deep Sea Local Union those persons who will be qualified to be trained to operate Paceco or similar type cranes.

The Employer will select the individual longshoreman by name from a list furnished by the Deep Sea Local Union to operate container machines.

When direct voice communication is not possible between operators of Paceco and/or similar type cranes and the signalman, then electronic communications must be provided.

Rule 28. Gang Foreman

Before a longshoreman can be included on a list of men eligible as Gang Foremen, he must first meet the following requirements:

(a) Worked at least five (5) consecutive years as a longshoreman unless nomination to Gang Foreman List is mutually agreed on;

(b) Attended a 16-hour Safety Course, as prescribed and administered by the West Gulf Maritime Association.

(c) Qualified to direct any work normally performed by a longshoreman.

It is understood and agreed that clauses (a), (b) and (c) above are applicable to new Gang Foremen effective with the signing of this Agreement.

Within 15 days of the signing of this Agreement, each Local shall submit to the employers in each port a list of the men they consider eligible as Gang Foremen. These men will continue eligible as Gang Foremen until such time as any employer files a complaint against them. Any such complaint shall be filed with a panel of two representatives from the Local and two representatives from the employers other than complainant. Within five days after the filing of a complaint against a man by any employer, said panel shall make a decision that the man in question shall be continued as an eligible gang foreman, or that he shall not. Three votes of this panel shall constitute a decision. In the event of a tie vote of this Panel, or in the event this Panel does not make the required decision within five days, the complaint against the man shall automatically be transferred to the employers as a group, and they shall decide whether the man shall continue as a Gang Foreman or not. In the event the man is removed from the list of eligible gang foremen by the employers, they shall then select a replacement of their choice from additional names furnished by the local.

Gang Foremen will not be accepted for employment unless he has been selected from eligible Gang Foremen List submitted to the employers.

A Gang Foreman failing to carry his own gang shall be removed from the Gang Foremen's List within 5 days unless his absence was due to a legitimate reason.

Gang Foreman shall direct the use of stevedore's equipment and shall prevent the abuse and/or theft thereof.

There shall be only one gang foreman to each working whip. Gang Foremen to be leadermen of their gangs and to have the duty of assigning all men in the gang subject

to supervision and direction of the stevedore, Gang foremen to receive 50 cents per hour over and above other men in the gang.

It is expressly understood that a gang foreman, like other men in the gang, is not hired and does not become an employee of any of the First Parties until he actually reports at shipside ready for work.

Any unresolved dispute under this clause can be referred to the arbitrator.

ADDENDUM B

Table Showing Effect of Assumed Escalation of Benefits of 7% Per Year for 50 Years

Year No.	Weekly Compensation Rate Increased 7% Per Year*	Total Compensation Payable Each Year	Cumulative Total of Compensation
1	$ 426.26	$ 22,165.	
2	456.	23,712.	$ 45,818.
3	488.	25,376.	71,254.
4	522.	27,144.	98,398.
5	559.	29,068.	127,466.
6	598.	31,096.	158,562.
7	640.	33,280.	191,842.
8	685.	35,620.	227,462.
9	733.	38,116.	265,578.
10	784.	40,768.	306,346.
11	839.	43,628.	349,974.
12	898.	46,696.	396,670.
13	961.	49,972.	446,642.
14	1,028.	53,456.	500,098.
15	1,100.	57,200.	557,298.
16	1,177.	61,204.	618,502.
17	1,259.	65,468.	683,970.
18	1,347.	70,044.	754,014.
19	1,441.	74,932.	828,946.
20	1,542.	80,184.	909,130.
21	1,650.	85,800.	994,930.
22	1,766.	91,832.	1,086,762.
23	1,890.	98,280.	1,185,042.
24	2,022.	105,144.	1,290,186.
25	2,164.	112,528.	1,402,714.
26	2,315.	120,380.	1,523,094.
27	2,477.	128,804.	1,651,898.
28	2,650.	137,800.	1,789,698.
29	2,836.	147,472.	1,937,170.
30	3,035.	157,820.	2,094,990.
31	3,247.	168,844.	2,263,834.

32	3,474.	180,648.	2,444,482.
33	3,717.	193,284.	2,637,766.
34	3,977.	206,804.	2,844,570.
35	4,255.	221,260.	3,065,830.
36	4,553.	236,756.	3,302,586.
37	4,872.	253,344.	3,555,930.
38	5,213.	271,076.	3,827,006.
39	5,578.	290,056.	4,117,062.
40	5,968.	310,336.	4,427,398.
41	6,386.	332,072.	4,759,470.
42	6,833.	355,316.	5,114,786.
43	7,311.	380,172.	5,494,958.
44	7,823.	406,796.	5,901,754.
45	8,371.	435,292.	6,337,046.
46	8,957.	465,764.	6,802,810.
47	9,584.	498,368.	7,301,178.
48	10,255.	533,260.	7,834,438.
49	10,973.	570,596.	8,405,034.
50	11,741.	610,532.	9,015,566.
51	12,563.	653,276.	9,668,842.

---

* Rounded to nearest dollar as provided in 33 U.S.C.A. § 910(g).

ADDENDUM C

Mathematical Calculations
Of Spendable Income

Assumptions:

1. Average weekly wages of $639.39 equals $33,-248.28 per year.
2. Weekly compensation of $426.26 (2/3rds of $639.39) equals $22,165.52 per year.
3. Union service charges or dues computed at 3.93% based on such charges or dues in Port of Houston, Texas for fiscal year ending September 30, 1979, deducted from employees' pay checks just like income and social security taxes. From gross longshore wages of $66,302,094.96, such dues totaled $2,604,778.94.

Married longshoreman with two children:

Gross income	$33,248.28
Less income tax	5,985.00
Less social security tax	1,587.67
Sub-total	$25,675.61*
Less union dues	1,306.66
Spendable Income	$24,368.95**

*Spendable income before union dues deducted of $25,675.61 divided into annual compensation of $22,165.52 equals 86.3%.

**Spendable income after union dues deducted of $24,368.95 divided into anuual compensation of $22,165.52 equals 91%.

Single Longshoreman with no dependents:

Gross income	$33,248.28
Less income tax	8,951.24
Less social security tax	1,587.67
Sub-total	$22,709.37*
Less union dues	1,306.66
Spendable Income	$21,402.71**

*Spendable income before union dues deducted of $22,709.37 divided into annual compensation of $22,165.52 equals 97.6%.

**Spendable income after deducting union dues of $21,402.71 divided into annual compensation of $22,165.52 equals 103.6%

Assuming 40% permanent partial loss of wage earning capacity of $13,248.28 and wages earned of $20,000 per year, compensation received would be 2/3rds of $13,248.28 which is $8,832.19 per year.

Married longshoreman with two children:

Gross income	$20,000.00
Less income tax	2,271.00
Less social security tax	1,226.00
Less union dues	786.00
Spendable income	$15,717.00
Compensation	$8,832.19
Total spendable income	$24,549.19*

*Pre-injury spendable income of $24,368.95 divided into spendable income from wages and compensation of $24,549.19 equals 100.7%.

Single man with no dependents:

Gross income	$20,000.00
Less income tax	3,829.00
Less social security tax	1,226.00
Less union dues	786.00
Spendable income	$14,159.00
Compensation	$8,832.19
Total spendable income	$22,991.19*

*Pre-injury spendable income of $21,402.71 divided into spendable income from wages and compensation of $22,991.19 equals 107.4%.

ADDENDUM D

Extract From

Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess. on S.2318, S.525 and S.1547.

May 2, 10, 17, 27 and June 5, 1972
Pages 307-310

A COMPILATION OF THIRD PARTY CASE FIGURES FILED IN THE SOUTHERN DISTRICT OF TEXAS

The erroneousness of the figures supplied to the Committee by Mr. McGuigan on behalf of the AFL-CIO occurred because he considered only the marine personal injury cases filed under the diversity of citizenship jurisdiction of United States District Courts. The figures did not take into consideration the marine personal injury cases filed under federal question jurisdiction including cases filed in Admiralty, which are kept separate for statistical purposes by the Administrative Office of the United States Courts.

A personal conference with Mr. James A. McCafferty, Assistant Chief, Division of Information Systems of the Administrative office of the United States Courts, revealed that there was no way to determine from the statistical information available in the Administrative Office of the United States Courts how many third party longshore cases had been filed either on a nationwide basis or by districts. The only way this statistical information can be obtained is by an examination of the docket sheet of each case filed in each office of a United States

District Clerk. Even this is not certain to reveal all of the third party longshore cases as reviewing the docket sheet only will give you the designation placed on it by one of the deputy clerks. Thus, the accuracy of the longshore third party figures by looking at the docket sheet only is still subject to some error on the low side, and only a personal examination of the district clerk's file with respect to each of its cases would reveal all of the third party longshore cases that have been filed.

In making our study of the docket sheets only, without examining the individual case files, in the Southern District of Texas, only those docket sheets which clearly reflected that the case was a longshoreman's or harbor worker's third party case were counted as being such a third party longshoreman's or harbor worker's case. The time consumed in compiling the statistics in the Southern District of Texas involved an examination of the records of the United States District Clerk's office in Brownsville, Corpus Christi, Galveston and Houston.

The time required to make this study in the Southern District of Texas totaled approximately 60 manhours and involved checking approximately 16,154 docket sheets. Projecting this nationwide, to obtain this information for all of the districts, I estimate would take approximately 2,650 additional manhours, and would involve checking approximately 715,146 additional docket sheets. For the Gulf area the information from the Southern District of Texas should be adequate to demonstrate the erroneousness of the AFL-CIO figures.

The information developed on the Southern District of Texas showed:

Fiscal Year	Total No. of Private Marine Per. Inj. Cases Filed Per Administrative Office of U. S. Courts Under Federal Question & Diversity of Citizenship Jurisdiction	AFL-CIO's Figure on Diversity Jurisdiction	Total No. of Longshoremen's & Harbor Workers' Third Party Cases Filed
1971	499	33	237
1970	450	35	213
1969	403	42	209
1968	337	48	185
1967	331	93	174
1966	260	86	117
1965	269	81	128
1964	278	73	101
1963	229	58	70
1962	284	138	129
Total	3,340	687	1,563
Five Year Totals			
1967-1971	2,020	251	1,018
1962-1966	1,320	436	545

The foregoing figures from the Southern District of Texas demonstrate the continuing growth of the circular liability problem insofar as longshoremen and harbor worker injuries are concerned. During the five year period from fiscal 1962 through fiscal 1966 an average of 109 third party longshore cases per year were filed, with a high of 129 and a low of 70. During the next five years, fiscal 1967 through fiscal 1971, an average of 203 third party longshore cases per year were filed with a high of 237 in 1971 and a low of 174 in 1967. This represents an average increase of approximately 86% for the most recent five year period.

The total number of marine personal injury cases of all kinds filed in the Southern District of Texas increased by 700 during the five year period 1967-1971. Of the 700 case increase, 473 or approximately 67½ % of them were third party longshoremen or harbor worker injury cases.

I believe that these figures graphically demonstrate the continuing growth of the circular liability cases under the Longshoremen's Act in Texas.

No. 79-512

Supreme Court, U. S.
FILED
SEP 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

vs.

LAURO DE LOS SANTOS and
SEATTLE STEVEDORE CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* ON BEHALF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF LAURO DE LOS SANTOS, RESPONDENT

HARRY M. PHILO,
President,
409 Griswold Street,
Detroit, Michigan 48226.

ARTHUR ROTH,
Chairman, Admiralty Law Section
1111 Ainsley Building,
14 Northeast 1st Avenue,
Miami, Florida 33132.

NATHAN BAKER,
One Newark Street,
Hoboken, New Jersey 07030.
(201) 659-2635
Of Counsel.

JAMES A. GEORGE,
8110 Summa Drive,
Baton Rouge, Louisiana 70809.
Of Counsel.

ROSS M. DIAMOND,
P.O. Drawer 3066,
Mobile, Alabama 36601.
Of Counsel.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
CONSENT OF PARTIES	1
STATEMENT OF INTEREST	2
QUESTION PRESENTED	2
SUMMARY OF ARGUMENT	3
ARGUMENT—In accordance with the legislative intent under Sec. 905(b) of the 1972 Amendment of the Longshoremen's and Harbor Workers' Compensation Act in eliminating the action based on unseaworthiness and allowing a remedy for negligence, the standard of care that will enhance safety on board ship is reasonable care under all the circumstances	4
CONCLUSION	19
Letter from James A. Grutz, Esq. to Nathan Baker, Esq., dated June 20, 1980	20
Letter from Grayden S. Staring, Esq. to Nathan Baker, Esq., dated June 26, 1980	21

Cases Cited

American Commercial Lines v. Griffith, 100 Sup.Ct. 727 (1980), Petition to the Third Circuit, 610 F.2d 116	17
Anuszewski v. Dynamic Mariner, 540 F2d 757 (4th Cir. 1976)	5

PAGE

Bachtel v. Monmouth Bulk Carriers, 605 F2d 438 (9th Cir. 1979) 6

Brown v. Mitsubishi, 550 F.2d 331 (5th Cir. 1977) 5

Canizzo v. Farrell Lines, 579 F2d 682 (2nd Cir. 1978) 6

Chavis v. Finnlines, 576 F2d 1072 (4th Cir. 1978) .. 5

Clemons v. Mitsui O.S.K. Lines, 596 F2d 746 12

Cox v. Flota Merchante, 577 F2d 798 (2nd Cir. 1978) 6

Davis v. Inca Compania, 440 Fed. Supp. 448 (W.D. Wash. 1977) 15, 18

Edmonds v. Compagnie Generale Transatlantique, 99 S.Ct. 2753 (1979), 358 U.S. 625 16

Gallardo v. Westfal-Larsen, 435 Fed. Supp. 484 (N.D. Cal. 1977) 15

Gay v. Ocean Transport, 546 F2d 1233 (5th Cir. 1977) 5

Giglio v. Farrell Lines, 613 F2d 429 (2nd Cir. 1980) 6

Griffith v. Wheeling-Pittsburg Steel, 610 F2d 116 (3rd Cir. 1979) 6, 13, 18

Johnson v. A/S Ivarans Roderi, 613 F2d 334 (1st Cir. 1980) 6, 8, 12-14, 18

Kermarec v. Compagnie, 358 U.S. 625, 79 S.Ct. 406 14-16

Lawson v. U.S.A., 605 F2d 448 (9th Cir. 1979) 6

Lubrano v. Royal Netherlands, 572 F2d 364 (2nd Cir. 1978) 6

Mathews v. Ernst Russ SS Co., 603 F2d 676 (7th Cir. 1979) 6

PAGE

Napoli v. Hellenic Lines, 536 F2d 505 (2nd Cir. 1976) 5

Samuels v. Empresa Lineas, 573 F2d 884 (5th Cir. 1978) 5

Santos v. Scindia, 598 F2d 480 .....10, 13, 18

Statutes Cited

Federal Maritime Law 15

33 U.S.C. (Longshoremen's and Harbor Workers' Compensation Act, as amended 1972):

Sec. 5(b) 18

Sec. 905(b) 2-4, 19

Rule Cited

United States Supreme Court Rules:

36 1

Other Authorities Cited

Report, House Committee No. 92-1411 on the 1972 Amendments 6

p. 4704 11

p. 4705 15

Restatement (Second) of Torts:

Sec. 343 .....3, 5, 12, 13

Sec. 343A 3, 5, 12, 13

No. 79-512

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

vs.

LAURO DE LOS SANTOS and
SEATTLE STEVEDORE CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF LAURO DE LOS SANTOS, RESPONDENT

To the Honorable Justices of the Supreme Court of the United States:

Consent of Parties

Pursuant to Rule 36 of the U. S. Supreme Court Rules, this Brief *Amicus Curiae* is being filed with the written consent of all parties to the case, copies of which are attached hereto, in support of Lauro de Los Santos, Respondent.

Statement of Interest

This Brief *Amicus Curiae* is being submitted by the Admiralty Law Section of The Association of Trial Lawyers of America, a national Bar Association consisting of more than 40,000 lawyers who primarily represent plaintiffs in personal injury and death litigation and workers' compensation. The Admiralty Law Section includes most of the attorneys throughout the United States who specialize in Maritime Personal Injury Law.

The pending case is of great importance which will decide the maritime law on the question presented and affect the welfare of many plaintiffs in maritime cases now pending throughout the country.

We believe that based on our research and analysis of the law and our experience in the maritime law and the interests of safety of workmen on board vessels, that our brief argument will be of assistance to the Court.

Our Brief will be limited to the one question presented herein without any reference or review of the facts.

Question Presented

Is the standard of care in a longshoreman's negligence action against a vessel owner under §905(b) of the U.S. Longshoremen's and Harbor Workers' Compensation Act as amended 1972, reasonable care under all of the circumstances?

Summary of Argument

I. In accordance with the legislative intent under § 905 (b) of the 1972 amendment of the Longshoremen's and Harbor Workers' Compensation Act in eliminating the action based on unseaworthiness and allowing a remedy for negligence, the standard of care that will enhance *safety* on board ship is *reasonable care under all the circumstances.*

II. The legislative history indicates that nothing in the Bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or *should have known* about a dangerous condition so as to meet the objective of encouraging safety.

III. The standard of care based on the application of Restatement (Second) of Torts § 343 and § 343A derived from analogies to land-based tort concepts, which was heavily laden with the defenses of contributory negligence and assumption of risk, must be rejected as contrary to the intent of Congress.

IV. It is in the best interest of *safety* that *both* the stevedoring company and the vessel should be responsible to correct the dangerous condition. The failure of the stevedore to remedy a dangerous condition should not exculpate the shipowner from liability if it knew or should have known of the dangerous conditions. Otherwise it would negate liability based upon concurrent negligence and would not be in accordance with the legislative intent to encourage *safety.*

V. The application of Restatement (Second) of Torts would incorporate rules involving real estate torts and of invitees and licensees contrary to maritime traditions of simplicity and practicality and would undercut Congress' intention to promote safety.

VI. The standard of reasonable care under the circumstances established by *Santos,* the case under review, and followed by *Johnson* and *Griffith* will have the maximum positive impact on safety and will be consistent with the strong admiralty traditions of simplicity and practicality.

ARGUMENT

In accordance with the legislative intent under § 905 (b) of the 1972 Amendment of the Longshoremen's and Harbor Workers' Compensation Act in eliminating the action based on unseaworthiness and allowing a remedy for negligence, the standard of care that will enhance *safety* on board ship is *reasonable care under all the circumstances.*

This question now presented to the Supreme Court of the United States is of paramount importance because of the conflicting decisions of the Circuit Court of Appeals of the various Circuits, thus requiring the interpretation by the Supreme Court to bring uniformity to this phase of the maritime law on the basis of safety, having regard to the intent of Congress.

The 1972 amendment took away the right of the longshoremen and harbor workers to sue the vessel for breach of warranty of seaworthiness, but explicitly preserved their right to sue the shipowner for negligence. 33 U.S.C. § 905(b).

The Act does not define negligence so that the Circuits which have considered the question have applied different standards.

The Second, Fourth and Fifth Circuits have defined negligence under the 1972 Amendment in terms of a land-

owner's duty to invitees under the Restatement (Second) of Torts § 343 and § 343A.

This is based on the legislative history that "the vessel shall not be liable as a third party unless it is proven to have acted or failed to act in a negligent manner such as would render a *land-based* third party in non-maritime pursuits liable under similar circumstances.

Under § 343 and § 343A of Restatement (Second) of Torts, when the danger is open and obvious and in addition is avoidable in the exercise of ordinary care and therefore the harm is not foreseeable, it is not considered negligent to allow the danger to exist.

2nd Circuit *Napoli* v. *Hellenic Lines,* 536 F2d 505 (1976)
4th Circuit *Anuszewski* v. *Dynamic Mariner,* 540 F2d 757 (1976)
4th Circuit *Chavis* v. *Finnlines,* 576 F2d 1072 (1978)
5th Circuit *Brown* v. *Mitsubishi,* 550 F2d 331 (1977)
5th Circuit* *Gay* v. *Ocean Transport,* 546 F2d 1233 (1977)
5th Circuit *Samuels* v. *Empresa Lineas,* 573 F2d 884 (1978)

The 9th Circuit, 7th Circuit, 3rd Circuit and 1st Circuit have followed the ruling in the *Santos* v. *Scindia* case under review in this appeal which rejects the standard of

---

* The Fifth Circuit in *Gay* v. *Ocean Transport* made clear that §343 and §343A were being followed for the purpose of uniformity of decisions in that circuit, but with the proviso that §343A is not interpreted to incorporate assumption of risk and contributory negligence as bars to recovery.

land-based tort concepts and adopts the standard of reasonable care under the circumstances.

9th Circuit *Bachtel* v. *Mammouth Bulk Carriers,* 605 F2d 438 (Aug 1979)
7th Circuit *Mathews* v. *Ernst Russ SS Co.,* 603 F2d 676 (Aug 1979)
9th Circuit *Lawson* v. *U.S.A.,* 605 F2d 448 (Aug 1979)
3rd Circuit *Griffith* v. *Wheeling-Pittsburg Steel,* 610 F2d 116 (Aug 1979)
1st Circuit *Johnson* v. *A/S Ivarans Roderi,* 613 F2d 334 (Jan 1980)

In the 2nd Circuit, the various panels were not in complete harmony resulting in dissenting opinions being filed.

Canizzo v. *Farrell Lines,* 579 F2d 682 (1978) disagreeing with (J. Friendly dissenting)
Cox v. *Flota Merchante,* 577 F2d 798 (1978)
Lubrano v. *Royal Netherlands,* 572 F2d 364 (1978) (C. J. Moore dissenting)
Giglio v. *Farrell Lines,* 613 F2d 429 (1980) (C J Oakes dissenting P 436)

The courts have looked to the legislative history of the Act for assistance to determine how the standard of care constituting negligence is to be construed and applied. The report of the House Committee No. 92-1411 on the 1972 Amendments is most helpful. The pertinent clauses are as follows:

"* * * Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and *safety* of employees

who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'nondelegable duty', or the like."

* * *

"Permitting actions against the vessel based on negligence will meet the objective of encouraging *safety* because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition. So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the cir-

> cumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.
>
> Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his right against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non maritime pursuits liable under similar circumstances. * * *"

The legislative history indicates that the main objective of the 1972 Amendment to the Act was to protect the health and *safety* of the longshoremen working on board vessels in granting liability of vessels as third parties on the basis of negligence rather than the no-fault concept of unseaworthiness. The objective of encouraging *safety* will be met by holding the vessel responsible to take appropriate corrective action where it knows or should have known about a dangerous condition.

In the latest decision of the 1st Circuit, *Johnson* v. *A/S Ivarans Rederi,* 613 F2d 334 (Jan. 1980) written by C. J. Bownes, the court stated:

"* * * The overriding purpose of the 1972 amendments was to create incentives for safety in the nation's second most dangerous profession.

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the *vessel's responsibility* to *take appropriate corrective action* where is knows or *should have known* about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

House Report, supra, at 4704. This portion of the legislative history unequivocally asserts the intention of Congress that the vessel shall exercise a constant concern for the *safety* of longshoremen. In addition, it strongly implies that *Congress believed the 1972 amendments continued, rather than created, a duty on the part of the vessel to main-*

> *tain a safe place to work.* Although the last sentence acknowledges the stevedore's primary responsibility for safety in the work area, it also indicates that the vessel and the stevedore can be concurrently negligent in regard to a particular work hazard.* * *" (p. 339)
>
> "* * * Analyzing the House Report as a whole, we conclude that in enacting section 905(b), Congress intended that each of the parties in the stevedoring injury triangle—the vessel, the stevedore and the longshoreman—owe a duty to exercise reasonable care under the circumstances. Congress left to the courts the articulation and application of the standard of care in the particular circumstances of each case. The parameters of the standard of care the courts are to develop are clear: the vessel will continue to be liable for any negligent failure on its part to provide a safe place to work; OSHA regulations will continue to apply to all parties and may, in certain circumstances, define the appropriate standard of care; no standard of care may incorporate the doctrines of assumption of the risk, contributory negligence or liability without fault (unseaworthiness); the standard of care may be neither as unfavorable to the vessel as strict liability nor more unfavorable to the longshoreman than land-based tort law; the standard of care must evolve as a uniform body of national law; and, the body of law must develop as to have the *maximum impact on safety.* * * *" (p. 340)

In the case under review *Santos* v. *Scindia,* 598 F.2d 480, the Court stated:

> "First, Congress was concerned about *safety.* The Senate Committee on Labor and Public Welfare pro-

> tested that longshoring had an injury frequency rate 'well over four times the average for manufacturing operations,' and called for *safer working conditions* when it insisted that 'every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies . . .' Senate Report at 2 . . ." (p. 484)

The argument by the petitioner, Scindia Steam Navigation Co., Ltd., that the primary burden of safety should be upon the stevedore, and not upon the shipowner without actual knowledge of the unsafe conditions, is contrary to the express Congressional intent.

The House Report at 4704 provides "Thus nothing in this Bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or *should have known* about a dangerous condition." It then proceeds to give the well known example of the oil spill on the vessel's deck.

Permitting actions against the vessel based on negligence was meant to "meet the objective of encouraging safety." (House Report, p. 4704)

The argument of the petitioner that it was Congressional policy that emphasis be placed on compensation payments and precluding recovery from shipowner when injury resulted from stevedore's breach of OSHA regulations or other contributing stevedore negligence is not supported by the Congressional intent expressed in their Committee reports. Congress was concerned that the vessel owner not become lax in doing what it should reasonably be required to do to prevent injuries to longshoremen. Petitioner is now attempting to take away the longshoreman's right to recover for negligence of the shipowner,

which Congress refused to do when it enacted the 1972 amendments.

It is in the best interest of *safety* that *both* the stevedoring company and the vessel should be responsible to correct the dangerous condition. The failure of the stevedore to remedy a dangerous condition in the area where longshoremen are working should not exculpate the shipowner from liability, if it knew or should have known of the dangerous conditions. To conclude otherwise would negate liability based upon concurrent negligence and would not be in accordance with the legislative intent to encourage *safety.**

Again quoting from the *Johnson* case, *supra*:

> ". . . The Supreme Court has recently noted that, within legislative parameters, '[a]dmiralty law is judge-made law to a great extent.' Edmonds v. Compagnie Generale Transatlantique, —— U.S. ——, 99 S.Ct. 2753, 61 L.Ed. 2d 521 (1979).
> In deveolping this uniform body of national law, we must discard any concept antithetical to the intent of Congress and may incorporate into it recognized legal concepts that will promote the primary congressional objective of longshoremen safety . . ." (p. 340-341)

---

* In this regard, see *Clemons* v. *Mitsui O.S.K. Lines,* 596 F.2d 746, footnote 2, where the Seventh Circuit would appear to exonerate the vessel from liability if the stevedore were proven to have violated an OSHA regulation. It was also sharply criticized in *Johnson* v. *Ivarans Rederi,* supra, as being the type of case which is a pitfall inherent in the use of § 343 and § 343A approach in § 905(b) cases. See *Johnson,* footnote 12, p. 344-345, which concludes with "The effect of this rule, contrary to the intent of Congress, is to allow the vessel to be protected from its negligence." *Clemons,* Case No. 79-706 (Pet. for Cert. pending).

The First Circuit Court in the *Johnson* case, *supra* proceeded to adopt the standard of care "raised to maturity in *Santos* and *Griffith*" (P. 348):

> "* * * The standard of reasonable care under the circumstances permits a finding of negligence upon a showing:
>
> (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury;
>
> (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and
>
> (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger. * * *"

The *Johnson* case, *supra,* rejected a blanket adoption of §343 and 343A of Restatement (Second) of Torts following *Santos* and the *Griffith* cases and stated

> ". . . We conclude from our review of the decisions of courts which have adopted sections 343 and 343A that those courts have, contrary to the wishes of Congress, placed a higher value on national uniformity in the law than upon the creation of a standard of care that will enhance *safety* on board ship. . . ." (p. 349)

As above noted, while the overriding purpose of the 1972 amendments was the safety of the longshoremen, it was not achieved by the application of Restatement (Second) of Torts Sec. 343-343A which was heavily laden with the

defense of assumption of risk and contributory negligence. This is contrary to the intent of Congress which specifically rejected any bar to recovery based upon assumption of risk and contributory negligence.

The land-based standard of care under the Restatement (Second) of Torts would incorporate the common law of invitees into maritime law. This would be contrary to the standard of care free of status distinctions, decided by the Supreme Court in *Kermarec* v. *Compagnie,* 358 U.S. 625, 79 S.Ct. 406.

The distinction between invitee and licensee is contrary to maritime traditions of simplicity and practicality and is no longer recognized by virtue of the *Kermarec* decision. Even in land-locked jurisdictions, status distinctions are being abolished in favor of a single duty of reasonable care under the circumstances.

As stated in the *Johnson* case, *supra*:

> "* * * We discern in the statute and its legislative history no requirement that, in fashioning this uniform body of national law, the courts must adopt writ large the tort concepts developed over the years as to possessors of land as the standard of care for an industry that has until this time been governed by the principles of maritime law . . ." (340)

The legislative history never refers to Restatement and never used real property tort law terms such as invitee. In analogizing the liability of the vessel to that of "land-based" third parties, it meant to indicate that liability cannot be based on the admiralty doctrine of unseaworthiness, or like no-fault concept. It cannot mean the wholesale adoption of rules involving real estate torts where

the relation of the parties are different than those involving a ship and longshoremen.

> See *Davis* v. *Inca Compania,* 440 Fed. Supp. 448 (W.D. Wash. 1977).
> *Gallardo* v. *Westfal-Larsen,* 435 Fed. Supp. 484 (N.D. Cal. 1977).

To assure uniformity, the House Report, at 4705, provided:

> "* * * Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of *Federal* law . . ."

Maritime Tort Law is inherently Federal and intended to be uniform. The longshoreman's cause of action is maritime. Traditional maritime principles are consistent with the intentions of Congress and should govern.

The only Federal law which the House Report at 4705 could have been alluding to is Federal Maritime Law. This Court, in *Kermarec* v. *Compagnie, supra,* rejected a Court's charge styled on Restatement (Second) of Torts, § 343-343A, so strongly proposed by the petitioner—the vessel owner. See Note 2 on page 408, *Kermarec* decisions (1959). It is clear that Restatement of Torts has not governed the standard of care in negligence actions resulting from ship board accidents.

As the Supreme Court in the *Kermarec* opinion written by Mr. Justice Stewart stated:

> "* * * The incorporation of such concepts appears particularly unwarranted when it is remembered that they originated under a legal system in which status depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system in that respect entirely alien to the law of the sea. *We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case . . .*" (P. 410) (Italics ours)

If Congress was dissatisfied with the *Kermarec* rule of reasonable care under all the circumstances, it could have expressed such intention in enacting the 1972 amendment.

This Court should not now change what Congress understood to be the law when it enacted the 1972 amendment. It was so held by this Court in the case of *Edmonds* v. *Compagnie Generale Transatlantique,* 99 S.Ct. 2753 (1979), 358 U.S. 625, in a decision written by Mr. Justice White:

> "* * * In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change. 'One of the most controversial and difficult issues which [Congress was] required to resolve . . . concern[ed] the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations.' S.Rep. 8. By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances . . ." (P. 2763)

This Court has sought out the view of the Executive Branch on this very issue in the case of *American Commercial Lines* v. *Griffith* (100 Sup.Ct. 727 (1980) on Petition to the Third Circuit, 610 F.2d 116). The Government endorses the standard of reasonable care and we quote from Footnote 6, p. 6, *Brief Amicus Curiae* filed by the Solicitor General, October Term, 1979, No. 79-813:

> "As an abstract matter, we believe that the court of appeals has correctly construed Section 5(b). Although Congress indicated, that Section 5(b) incorporates 'land-based' principles of negligence (see *e.g.*, H.R. Rep. No. 92-1441, *supra,* at 4, 6; *Lubrano* v. *Royal Netherlands Steamship Co.,* 572 F.2d 364, 366 (2d Cir. 1978), it did not state that vessel owners should be treated as land owners in all circumstances. To the contrary, the language and legislative history of Section 5(b) strongly suggest that Congress intended the courts to apply general negligence principles in these cases. See H.R. Rep. No. 92-1441, *supra,* at 408. As the court of appeals pointed out (Pet. App. 12a-14a), the conclusion also seems more consistent with this Court's analysis in *Edmonds* v. *Compagnie Generale Transatlantique, supra,* and *Kermarec* v. *Compagnie Generale Transatlantique, supra,* 358 U.S. at 630-632, and with Congress' intent to reject common law rules of contributory negligence and assumption of risk. See generally *Johnson* v. *A/S Ivarans Rederi, supra,* 613 F.2d at 337-349. Finally, adoption in this context of the limitations imposed on a landowner's liability to an invitee 'would undercut Congress' intention to reduce the frequency of accidents by creating economic incentives to provide safer working conditions.' *Santos* v. *Scindia Steam Navigation Co., supra,* 598 F.2d at 487."

It is to be expressly noted that the Solicitor General in the Brief for the United States as *Amicus Curiae* filed in the *Griffith* case at the invitation of the United States Supreme Court on the question "Whether Sec. 5(b) of the Longshoremen's and Harbor Workers' Compensation Act establishes a general negligence standard in suits by longshoremen against vessel owners" agreed with the Circuit Court of Appeals' construction of Section 5(b) that imposes a general duty on vessel owners to exercise reasonable care under all the circumstances, citing *Johnson* and *Santos* cases.

The Brief of the United States further agrees that the contention that a vessel owner is liable only on those circumstances in which an owner of land would be accountable to an invitee would undercut Congress' intention to promote safety. *Santos,* p. 487.

Most important, requiring the vessel to exercise reasonable care under all the circumstances fulfills the legislative purpose to create safety incentives. *Davis* v. *Inca Compania, supra, Johnson* v. *Ivarans Rederi, supra.*

CONCLUSION

For the reasons stated, the standard of care set forth by the Court below, the Ninth Circuit, in a longshoreman's negligence action against a vessel owner under § 905(b) of the U. S. Longshoremen's & Harbor Workers' Compensation Act as amended in 1972, which they find responds to all five of Congress' concerns, including the promotion of safety, constitutes adoption of "reasonable care under the circumstances" standard which justifies the affirmance of this Ninth Circuit decision by this Court.

Respectfully submitted,

on behalf of

ASSOCIATION OF TRIAL LAWYERS OF AMERICA,

HARRY M. PHILO, President,

ARTHUR ROTH, Chairman,
Admiralty Law Section,

NATHAN BAKER, Of Counsel,

JAMES A. GEORGE, Of Counsel,

ROSS M. DIAMOND, Of Counsel.

Letter from James A. Grutz, Esq to Nathan Baker, Esq., dated June 20, 1980

[LETTERHEAD OF JACKSON, ULVESTAD, GOODWIN & GRUTZ]

June 20, 1980

Nathan Baker, Esq.
1 Newark Street
P.O. Box M-H
Hoboken, N.J. 07030

Re: Santos v. Scindia Steam Navigation Company
No. 79-512

Dear Mr. Baker:

I am writing at this time to indicate my consent to the filing of an amicus brief in this matter.

Very truly yours,

JACKSON, ULVESTAD, GOODWIN & GRUTZ

JAMES A. GRUTZ

JAG:kg

cc: Graydon S. Staring, Esq.
cc: James A. George, Esq.
cc: Ross M. Diamond, Esq.

Letter from Grayden S. Staring, Esq. to Nathan Baker, Esq., dated June 26, 1980

[LETTERHEAD OF LILLICK MCHOSE & CHARLES]

June 26, 1980

Nathan Baker, Esq.
Baker, Garber, Duffy & Baker
1 Newark Street
P.O. Box M-H
Hoboken, New Jersey 07030

RE: Santos v. Scindia Steam Navigation Co., Ltd.
No. 70-512

Dear Mr. Baker:

I hereby consent to the filing of a brief amicus curiae in the above case on behalf of the Association of Trial Lawyers of America.

Very truly yours,

LILLICK MCHOSE & CHARLES

GRAYDON S. STARING

011:63:WES01.79285

cc: James A. George, Esq.
George & George, Ltd.
8110 Summa Drive
Baton Rouge, Louisiana
70809

Ross M. Diamond, Esq.
Diamond, Lattof, Gardner, Pate & Peters
Suite 510 Van Antwerp
P.O. Drawer 3066
Mobile, Alabama 39901

James A. Grutz, Esq.
Jackson, Ulvestad, Goodwin & Grutz
1425 IBM Building
Seattle, Washington
98101